93-314

Supreme Court, U.S.
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No. _____

In The
Supreme Court Of The United States

October Term, 1993

RONALD O. PELLETIER,
Petitioner

v.

GARY D. ZWEIFEL,
Respondent

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTIONS PRESENTED FOR REVIEW

I. Under what circumstances should a Court of Appeals reverse a district court's determination that imposition of Rule 11 sanctions is not warranted?

A. Should this Court resolve a conflict among the Circuits concerning the purpose of Rule 11 and decide whether the purpose of sanctions is to compensate a prevailing party (as the Court of Appeals held in this case) or, rather, whether sanctions are intended to deter conduct violative of the Rule?

B. Should a Court of Appeals determine the nature and scope of an appropriate Rule 11 sanction without a consideration of what sanction is the minimum sanction necessary to deter violative conduct?

C. Should a Court of Appeals re-examine and re-determine factual findings of a district court which led the district court to decline to impose Rule 11 sanctions?

D. Does the process that is due a person before Rule 11 sanctions are imposed include the right to an evidentiary hearing in the Court making the decision at which it can be determined whether an improper purpose was present and what sanction is the minimum necessary to deter conduct which is violative of the Rule?

E. Does the process that is due a person before financially ruinous Rule 11 sanctions are imposed include a hearing to consider the person's ability to pay?

II. Should Rule 11 sanctions be imposed when a Court of Appeals affirms a grant of summary judgment based on adversely-drawn inferences concerning issues which were neither raised nor briefed on appeal?

III. Should Rule 11 sanctions be imposed when a Court of Appeals affirms a grant of summary judgment based on adversely-drawn inferences concerning issues which were neither raised nor briefed on appeal?

IV. Should Rule 11 be used to deter attorneys from filing lawsuits under a broad, ambiguous, judicially disfavored statute (the RICO Act)?

LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest in the outcome of this litigation. There are no parent or subsidiary companies which are required to be listed.

Petitioners:	Ronald O. Pelletier
Respondent:	Gary D. Zweifel
Other entities with an interest:	Herbert P. Schlanger Lokey & Bowden Shand, Morahan & Company, Inc. General Accident Ins. Co. of America, Inc.

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OPINIONS BELOW

The district court's opinions granting summary judgment to the defendant and denying imposition of Rule 11 sanctions against the plaintiff were not reported and are reproduced in the Appendix at App. 1 and 15. The Court of Appeals' opinion ordering imposition of Rule 11 sanctions is reported at 921 F.2d 1465 (11th Cir., 1991).[1] The district court's opinion imposing the sanctions directed by the Court of Appeals was not reported and is reproduced in the Appendix at App. 18. The Court of Appeals' opinion reversing the district court's determination of the amount of the sanction is reproduced in the Appendix at App. 24. The district court's order on remand is reproduced in the Appendix at App. 30.

JURISDICTION OF THIS COURT

The Court of Appeals' decision in this matter was rendered on March 18, 1993, and a timely petition for re-hearing or re-hearing en banc was denied on May 14, 1993. This petition has been timely filed under the provisions of Rule 13 of the Rules of this Court. Jurisdiction to hear and decide this matter is conferred by 28 U.S.C. §1254(1).

RULE PROVISIONS INVOLVED

Rule 11, Federal Rules of Civil Procedure

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated.... The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after

1 Because of its length, this opinion is not reproduced in the Appendix. It was reproduced in the Appendix of the petitioners' previous petition for a writ of certiorari, Case Number 91-3.

reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 56, Federal Rules of Civil Procedure

(b) For Defending Party. A party against whom a claim... is asserted ... may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. ... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

STATEMENT OF THE CASE

This case involves the summary imposition, by the Court of Appeals, of over $300,000.00 in Rule 11 sanctions, which constitutes the imposition of a financial "death penalty" on counsel.[2] The sanctions were imposed by the Court of Appeals

2. Attorney Schlanger has filed a Chapter 11 petition in bankruptcy, occasioned by the Consequences of the Court of Appeals' judgment.

in the face of the district court's denial of sanctions and without benefit of any evidentiary hearing and with no consideration of the necessity or propriety of those sanctions to deter conduct violative of Rule 11.

Pelletier initially sued Zweifel alleging, inter alia, a violation of the RICO Act. It was claimed that Zweifel had joined with his client, Culpepper, in (and had knowingly furthered) an on-going scheme fraudulently to induce investments in Culpepper's travel agency (referred to below as "BHT") with false promises of managerial changes and control.[3] Zweifel moved to dismiss the suit for failure to state a claim but his motion was, in its most significant parts, denied and the case proceeded through discovery. There were no discovery disputes of any consequence and neither party sought extra-judicial publicity.

After discovery was completed, Zweifel moved for summaryjudgment and for Rule 11 sanctions. The district court granted Zweifel summary judgment but denied the motion for sanctions, holding that although, in "plaintiff's extremely fact specific complaint" "many of the discrete facts specifically pled in the complaint are true ..., the inference sought by plaintiff... is not warranted by the evidence", Order of July 10, 1989, p.2; R.7-80-2.

Both sides appealed and the Court of Appeals affirmed the grant of summary judgment. On Mr. Zweifel's cross-appeal, however, the Court of Appeals held that the district court undertook too narrow a review and should have viewed the complaint as a whole, Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir., 1991).

In an extended and scathing opinion, after reweighing and re-characterizing the evidence in a light more favorable to Mr. Zweifel (which enabled it to reach a conclusion diametri-

3. A more detailed exposition of the facts of the underlying litigation is set out in the petition for a writ of certiorari which was filed in this Court by petitioners in 1991, Pelletier v. Zweifel, Case number 91-3.

cally opposed to the decision reached by the district court) and deciding questions of law neither briefed nor argued on appeal, the Court of Appeals reversed the denial of sanctions. It held that -- despite the voluminous evidence cited by Mr. Pelletier[4] and the denial ofZweifel's summary judgment motion by the trial court in a companion state court action based on essentially the same facts, Pelletier v. Lokey & Bowden, 192 Ga.App. 470, 385 S.E.2d 90 (1989) -- the complaint (a) was factually baseless, (b) was filed for an improper purpose, and (c) was frivolous when filed.

In its opinion, the panel roundly castigated Messrs. Pelletier and Schlanger. With no basis in the evidence, it accused them of extortion and of engaging in a "shake down", 921 F.2d at 1522. The case was remanded with directions to impose sanctions under Rule 11 against both Mr. Pelletier and Mr. Schlanger and further mandated clearly and precisely what those sanctions should be -- the amount Mr. Zweifel had paid in fees and costs:

... We accordingly remand the case for the imposition of such sanctions as will recompense Zweifel for the expenses that he incurred, including attorney's fees, in defending this suit in the district court.

921 F.2d at 1470 (emphasis supplied)

and

... [W]e direct the district court, upon receipt of our mandate, to award Zweifel a sum of money that will compensate him for the attorney's fees, litigation expenses, and costs he incurred in defending this lawsuit in the district court and in prosecut-

4. When Zweifel moved for summary judgment, Pelletier responded and included in his memorandum, R.4-53, an itemization of the evidence supporting each of plaintiff's contention and refuting defendant's contentions (pp.4-70). He further filed a 125 page Response to Defendant's Statement of Material Facts and Counter-Statement of Material Facts, R.5-54, which cited to specific evidence contradicting many of the facts relied upon by Zweifel and which also set forth, paragraph by paragraph from the complaint, the facts supporting each allegation contained in the complaint (and acknowledging where inferences were sought to be drawn). These two documents were separately bound and submitted to the Court of Appeals as a "Supplement to Required Excerpts of Record".

ing his motion for Rule 11 sanctions.

921 F.2d at 1522 (emphasis supplied)

On remand, the evidence was undisputed and the district court found that Zweifel had incurred no fees or costs. As Zweifel's counsel admitted:

> MR. BARTLETT: So, that's where we stand, and under Mr. Schlanger's theory of the case, then Mr. Zweifel has not paid anything as far as this case is concerned. So, therefore, if Mr. Schlanger is correct, Mr. Zweifel is not entitled to anything.

R.10-15 (emphasis supplied).

The district court nevertheless, in keeping with the spirit and language of the mandate, imposed a sanction of $25,000.00 against Schlanger and Pelletier.

Zweifel appealed, seeking an increase in the amount to over $300,000 to compensate his insurance carrier (not him); Pelletier and Schlanger cross-appealed to have the amount reduced to the amount Mr. Zweifel actually "incurred". The panel re-read its earlier mandate, decided that the plain meaning of the words it had used had not produced the result it desired, and directed that judgment be entered in the amount of $301,156.46, plus costs and interest.

REASONS FOR ALLOWANCE OF THE WRIT

1. The purpose of Rule 11 sanctions is not the compensation of parties (as the Court of Appeals held) but, rather, it is the deterrence of conduct violative of the Rule.

Compensation is not the appropriate measure of a proper sanction; an amount sufficient to deter conduct violative of Rule 11 is. See, e.g., White v. General Motors, 908 F.2d 675, 684-85 (10th Cir., 1990) ("[T]he primary purpose of sanctions

is to deter attorney and litigant misconduct, not to compensate the opposingparty for its costs in defending a frivolous suit. It is particularly inappropriate to use sanctions as a means of driving certain attorneys out of practice."); Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191, 194 (3rd Cir., 1988) ("A district court's choice of deterrent is 'appropriate when it is the minimum that will serve to adequately deter the undesirable behavior.'") and the cases and authorities cited therein; In re Kunstler, 914 F.2d 505, 522 (4th Cir., 1990) ("[T]he least severe sanction adequate to serve the purposes of Rule 11 should be imposed.... It is clear that Rule 11 should not blindly be used to shift fees." [citation omitted]); Stewart v. American Int'l Oil & Gas Co., 845 F.2d 196, 201-202 (9th Cir., 1988) ("The district court considered that although the full amounts appeared to be reasonable, a lesser amount was sufficient to get the attention of Meridian and deter it from further abuses. The imposition of sanctions was well within the sound discretion of the district court.").

The Court of Appeals in this case, however, chose compensation as its measure, 921 F.2d at 1522 and slip op. at p.3, and this choice conflicts with the reading given to Rule 11 by every other Court of Appeals which has considered the issue. Certiorari should be granted to resolve this conflict among the Circuits, to insure that the scope of a sanction is reasonably related to the purpose of the Rule -- deterrence -- and to insure that the Rule is not transformed into a blanket compensatory device without regard to its purpose.

a. A Court of Appeals should not determine the nature and scope of an appropriate Rule 11 sanction without a consideration of what sanction is the minimum sanction necessary to deter violative conduct.

Since the Court of Appeals chose compensation as the measure of the sanction, it never considered (and did not permit the district court to consider) what sanction was the "minimum that will serve to adequately deter the undesirable behavior", Doering, 857 F.2d at 194. Certiorari should be

granted to ensure that the law in the Eleventh Circuit (and elsewhere) remains consistent with both the purpose of the Rule (and its focus on deterrence) and with the decisions of the other Courts of Appeal, and that Rule 11 is not converted into a fee-shifting device.

b. A Court of Appeals should not re-examine and re-determine factual findings of a district court which led the district court to decline to imposeRule 11 sanctions.

The panel's decisions in this case conflict directly with this Court's holding in Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447 (1990). Certiorari should be granted to conform the law of the Eleventh Circuit to the law as declared by this Court and by other Courts of Appeals.

This Court held, in Cooter & Gell, that there are certain matters which should be left for a district court's initial determination: (1) whether there has been a violation of Rule 11; and, if so, (2) the nature and scope of an appropriate sanction. In this case, the panel undertook to determine all of these. As this Court said:

> The issues involved in determining whether an attorney has violated Rule 11 ... involve 'fact-intensive, close calls'.... [T]hat sanctions "shall" be imposed when a violation is found does not have any bearing on how to review the question whether the attorney's conduct violated Rule 11.... The district court is best acquainted with the local bar's litigation practices and thus best suited to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence. Deference to the determination of the courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and

> considered by the district court ....
>
> .... An appellate court's review of whether a legal position was reasonable or plausible enough under the circumstances is unlikely to establish clear guidelines for lower courts nor will it clarify the underlying principles of law.
>
> Cooter & Gell, 110 S.Ct., at 2460

The value of appellate review following a district court's denial of sanctions is even more limited than it is when it reviews the grant of sanctions.

Certiorari should be granted to define the proper, broad scope of the district court's discretion to deny Rule 11 sanctions and to emphasize the restricted nature of a proper appellate review of such a determination. A district court is obviously best situated to determine when it believes that the attorneys before it have abused the litigation process. If, given its experience and caseload, a district court does not believe that such abuse has taken place and believes that no sanctions are warranted, its determination should very rarely be disturbed (as this Court, in Cooter & Gell, recognized).

It would seem that, since "the central purpose of Rule 11 is to deter baseless filings in the district court and thus ...streamline the administration and procedure of the federal courts", Cooter & Gell, 110 S.Ct., at 2454, a district court decision not to impose sanctions should almost never be reversed. The Rule was enacted as a tool for use by the district courts to enable them to deal with what they perceive as abuses within their jurisdictions. If a district court does not feel impelled in a particular circumstance to use this mechanism, the Courts of Appeals should be particularly deferential to such judgments.

Perhaps the Court of Appeals' proper role could best be

described as a shield against an over-zealous use of the Rule by the district courts, while the district court's use of the Rule is a sword to be used when the district court feels the process has been abused. The Court of Appeals should not wield the district court's sword, nor force the district court to do so. Certiorari should be granted to insure that the law reflects the proper division of responsibility between the trial and appellate courts.

c. The process that is due a person before massive Rule 11 sanctions are imposed includes the right to an evidentiary hearing in the Court making the decision.

Due process requires that the tribunal deciding whether to impose large Rule 11 sanctions hold a hearing at which it can be determined whether an improper purpose was present and, if so, what sanction is the minimum necessary to deter conduct which is violative of the Rule. This should not (and can not) be done in a factual vacuum by a panel unfamiliar with the attorney upon whom sanctions are to be imposed.

This Court has recognized this principle:

> The issues involved in determining whether an attorney has violated Rule 11 ... involve 'fact-intensive, close calls'.... The district court is best acquainted with the local bar's litigation practices and thus best suited to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence. Deference to the determination of the courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court ....
>
> Cooter & Gell, 110 S.Ct., at 2460

The Fourth Circuit has taken a similar approach, articulated in In re Kunstler, 814 F.2d at 518-19:

> ... [W]e urge district courts to exercise special caution when evaluating a signer's purpose under Rule 11. When there are issues of credibility, disputed questions of fact, and rational explanations of purpose given, an evidentiary hearing may well be necessary to resolve the issues. This is particularly true when large sanctions are being considered on the ground of improper purposes as well as failure to comply with the first two prongs of Rule 11.
>
> In re Kunstler, 914 F.2d at 520.

The Court of Appeals in this case, however, ignored this caution and found that an "improper purpose" was present without benefit of any evidence or hearing on the issue. This Court should grant certiorari to clarify the meaning of the phrase "improper purpose" and restrict its use to the proper parameters and clearly to establish the need for an evidentiary hearing in circumstances such as those present in this case.

The Court of Appeals, having determined in its opinion that there was no factual basis for the complaint, ruled that, ipso facto, the suit must have been brought for an "improper purpose" and was, therefore, prosecuted in "bad faith", 921 F.2d at 1520-21. The operative phrase contained in Rule 11 is:

> that [the pleading] is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation....

The panel concluded that a "frivolous" suit is necessarily one which is brought "to harass" and is therefore brought within the language of this section. This conclusion is at odds with the language and purpose of the Rule and with interpretive decisions in other Circuits.

The phrase "improper purpose", when properly con-

strued, must relate to something other than the normal litigation process and its aim of making a plaintiff whole. For the filing of a complaint to be done for an "improper purpose" it must be done for reasons "such as to harass", and harassment must be something more than simply seeking compensation for a wrong.

An improper purpose might be evidenced by the tactics used in the litigation, e.g., conduct which is dilatory or which occasionsunnecessary expense (such as discovery abuse), or might be shown by extrinsic evidence demonstrating a purpose other than the seeking of compensation, e.g., to generate publicity, or to bring pressure to accede to terms in a transaction unrelated to the litigation, to gain competitive advantage, or to vent personal malice. Compare, In re Kunstler, 914 F.2d at 519-520. There is no evidence of any such conduct or purpose in this case, sanctions should not have been imposed under the "improper purpose" prong of Rule 11, and certiorari should be granted to ensure proper application and construction of that phrase.

d. The process that is due a person before financially ruinous Rule 11 sanctions are imposed includes a hearing to consider the person's ability to pay.

A determination of whether a sanction will be an effective deterrent cannot be made without a factual determination -- both as to the specific circumstances of those involved (individual deterrence) and the impact any specific sanction will have on other members of the Bar (general deterrence). This requires, at the least, a factual evaluation and determination (if monetary sanctions are deemed appropriate) of an ability to pay (since Rule 11 was not intended to impoverish attorneys and litigants, or to drive them into bankruptcy, but only to deter specific conduct) and of the sanction's effect on the attorney's continued ability to practice. While a $5,000.00 sanction might be a "slap on the wrist" to a financially successful partner in a major law firm, the same sanction might be totally destructive if imposed on a sole practitioner

with a financially marginal practice. See, e.g., Doering, 857 F.2d at 194-197 (3rd Cir., 1988); In re Yagman, 796F.2d 1165, 1185 (9th Cir., 1986).

The $300,000+ sanction imposed by the Court of Appeals is without question totally destructive in Mr. Schlanger's case. In such circumstances, a hearing is necessary. See, e.g., Donaldson v. Clark, 819 F.2d 1551, 1562 (11 Cir., 1987) (Johnson, J., with Tjoflat, Kravitch and Hatchett, JJ., concurring).

Certiorari should be granted to insure that persons being subjected to the imposition of sanctions are given the process due them, including a hearing.

2. The panel members should have recused themselves from further participation in this case after the first appeal was decided because the "appearance of impartiality" has been destroyed insofar as further proceedings were concerned.

The Third Circuit recently ordered the removal of a district court judge from a pending case because his strong comments in an opinion concerning the defendants destroyed "the appearance of impartiality", Haines v. Liggett Group, Inc., 975 F.2d 81, 98 (3rd Cir., 1992). The panel members in this case should have recused themselves and permitted a different panel to decide this appeal. This Court should grant certiorari and hold that the same standards which are applied to district judges should be applied to judges of the Court of Appeals.

In this case, the panel (which operated as the fact-finder) had accused Messrs. Schlanger and Pelletier of extortion and of engaging in a "shake down". It issued a plainly-worded mandate which was enforced according to its terms and the spirit of theopinion by the district court. Despite the panel's clearly expressed hostility and the evident personal animus it held toward Messrs. Schlanger and Pelletier, it sat to decide

the appeal, review its earlier factual decisions and interpret its earlier mandate. The result was an increase in the judgment amount from the $43,318.50, ordered by the district court in accordance with the plain meaning of the words of the opinion and mandate, to over $301,000.00.

As the Third Circuit noted in Haines, "The right to a trial by an impartial judge is a basic requirement of due process. Reassignment is appropriate to preserve not only the reality but also the appearance of the proper functioning of the judiciary as a neutral, impartial administrator of justice." This should be no less true of the functioning of an appellate court. The statements made in the earlier opinion by the panel, acting as fact-finders, creates at least the appearance that they are no longer "neutral, impartial administrator[s] of justice", and this Court should declare that recusal is the proper remedy in such a circumstance.

3. Rule 11 sanctions should not be imposed when Court of Appeals affirms a grant of summary judgment based on adversely-drawn inferences while deciding issues which were neither raised nor briefed on appeal.

   a. The summary judgment granted to the defendant was erroneously affirmed.

The district court decided Zweifel's summary judgment motion by determining that it was unreasonable to infer from the evidence that Zweifel knowingly participated in a scheme to defraud. The district court did not, however, explain why it believed the inference was unreasonable in light of the evidence presented.

The Court of Appeals went one step further and, in affirming the district court's grant of summary judgment, viewed many of the crucial facts in a light most favorable to Zweifel, the moving party, rather than Pelletier (who was opposing the motion). Viewing the facts in that light, the Court of Appeals naturally found that there was no scheme to

defraud and that Pelletier could, therefore, not prevail.

Both the Court of Appeals and the district court erred in the application of the standard by which motions for summary judgment should be measured and certiorari should be granted to correct this significant deviation from the standards set by this Court in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

The question is, when (as here) inferences are sought to be drawn from facts and those inferences concern a party's state of mind, intent, knowledge and motive, what constitutes a "genuine issue of material fact" in dispute. Here there was abundant evidence that Zweifel was an active participant in Culpepper's scheme to defraud. When, in these circumstances, a court grants summary judgment it is weighing the evidence and drawing conclusions based not on what other reasonable people might infer but based only on what the court infers. This it may not do.

Fraud is often subtle and difficult to prove with direct evidence; its existence is often a matter of inference. As the Court of Appeals of Georgia recently observed:

> The most successful fraud, and the most dangerous, is that which even when held up to light can be turned in such a way as to cast a flattering shadow.... We did not say [in our opinion] that [the appellant] committed a fraud, but we have no hesitation in saying that the underlying facts found by the trial court make out a case for at least constructive fraud, perhaps the more so because it seems so hard to detect.
>
> Liniado v. Alexander, ___ Ga.App. ___, ___ (1991), on motion for rehearing.

A determination of whether an individual knowingly participated in, or aided and abetted, a fraudulent scheme is often even more difficult to demonstrate directly. It requires the

fact-finder to determine intent, to weigh the knowledge, state of mind, and motive of the party charged -- and to consider the plausibility of the explanations given for the acts committed -- to determine whether he was acting innocently and independently or is culpable as an active participant. If there is any substantial evidence to indicate culpability, then it is not for a court to determine these things as a matter of law; it must be left for the jurors -- who can view the witnesses, hear their testimony and judge their demeanor and credibility.

As this Court stated in Liberty Lobby, 477 U.S., at 257, "the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." Such was the case here. The district court did not find that there was insufficient evidence from which a jury could find a scheme to defraud but held only that the evidence was insufficient to sustain an inference that Zweifel was a knowingparticipant in that scheme.

The district court and the Court of Appeals failed to explain why Zweifel's willful participation in a bankruptcy fraud is not evidence of his "knowing participation" in the scheme.

The district court and the Court of Appeals failed to explain why Zweifel's assistance to Culpepper in obtaining a replacement stock certificate following the admitted swindle perpetrated on Langston (another shareholder in Culpepper's company) in 1983 was not evidence of his "knowing participation" in the scheme.

The district court and the Court of Appeals failed to explain why Zweifel's failure to advise the board of directors of their power to break the apparent corporate deadlock was not evidence of his "knowing participation" in the scheme.

The district court and the Court of Appeals failed to

explain why Zweifel's contumacious actions in the light of numerous board resolutions was not evidence of his "knowing participation" in the scheme.

Certiorari should be granted to insure (1) that mere loss by a plaintiff of a summary judgment motion is not grounds for the imposition of Rule 11 sanctions, (2) that Rule 56 is not used to terminate prematurely arguably meritorious (though controversial and unpopular) suits and (3) that, where (as here) there is evidence of a knowing or willful participation in a fraudulent scheme or conspiracy, it is a jury and not a judge which ultimately decides the question.

b. The Court of Appeals should not have determined facts and decided issues of law which were neither briefed nor argued on appeal and should not have imposed sanctions based on a constricted reading of the RICO Act.

The Court of Appeals seized upon this case to send a message to plaintiffs generally:

> At a time when the federal courts - which are a scarce dispute resolution resoure, indeed - are straining under the pressure of an ever-increasing caseload, we simply cannot tolerate this type of litigation. Particularly with regard to civil RICO claims, plaintiffs must stop and think before filing them. If used correctly, the civil RICO provisions may have many salutary effects. Whenused improperly, as in this case, those provisions allow a complainant to shake down his opponent and, given the expense of defedning a RICO charge, to extort a settlement. Such improper use of the civil RICO provisions comes at the expense of the federal judiciary and those who need ready access to the courts.
>
> Pelletier v. Zweifel, 921 F.2d at 1522 (emphasis in original).

In order to send this message and to support its novel conclusion that the imposition of sanctions was warranted against the plaintiff and his counsel (despite the district court's contrary determination), the Court of Appeals had to reach out and, in over 60 pages, decide issues which were neither presented nor briefed on appeal (and as to all of which there is a significant question as to the proper resolution).[5] It held, among other things, that Pelletier's agreement with Culpepper was legally unenforceable, 921 F.2d at 1503, despite part performance (Pelletier's securing a line of credit for BHT); that his claim against Zweifel was barred by res judicata, 921 F.2d at 1500-02, even though the prior suit relied upon was not pled as an affirmative defense; that Pelletier could not possibly have been damaged by the unlawful filing of the bankruptcy petition for BHT, 921 F.2d at 1498;[6] and that, under state law, corporate counsel to a closely-held corporation owed no duty to the shareholders, 921 F.2d at 1491-92, fn.60. The Court of Appeals even undertook to decide issues presented (but not decided) in a different lawsuit -- Pelletier's state court action against Lokey & Bowden,[7] 921 F.2d at 1491, fn.60.

In addition, the Court of Appeals made numerous factual determinations which were either unsupported by the record, or required inferences to be drawn adverse to Pelletier, or were contradicted by evidence in the record. See, e.g. 921 F.2d at:

p.1498: "We hold that Pelletier would be incapable of proving at trial that the alleged bankruptcy fraud proximately caused him injury.";[8]

5. It is certainly at least arguable that any claim which requires a Court of Appeals to spend over 60 pages of analysis to examine and determine its "frivolity" is sufficiently complex and substantive so as not to be the basis for imposition of Rule 11 sanctions.

6. Pelletier's after-the-filing decision to permit BHT to continue to remain in bankruptcy (in an attempt to mitigate his damages and preserve what he could, at that point, of BHT's business and assets) does nothing to detract from the siginificance of the bankruptcy fraud itself and the added expenses incurred by Pelletier because if it.

7. Pelletier v. Lokey & Bowden, 192 Ga.App. 470, 385 S.E. 2d 90 (1989).

8. This question was neither raised by the defendant nor decided by the district court on defendant's motion for summary judgment.

p.1503: "After reviewing the evidence, we conclude that [Culpepper lacked the requisite criminal intent]: Pelletier convinced Culpepper that on Culpepper's signature on a contract would trigger Pelletier's pur chase of the Hurst Group's stock. Zweifel, therefore, could not have participated in a scheme to defraud -- there simplywas no scheme.";

p.1504: "Culpepper never intended to induce Pelletier to act ..."

"Pelletier and Culpepper ... must have realized that any oral promises ... were unenforceable."

"Culpepper believed that negotiations would continue, and that if the final draft agreement prepared by Conner was suitable, he would sign it.";

p.1505: "The record discloses that Zweifel did not know prior to the January 8 meeting in Conner's office that Pelletier already had purchased the Hurst Group's stock.";[9]

p.1506: "Zweifel's actions in the bankruptcy proceeings bolster his claim that he acted in good faith.";

"Assuming that Culpepper had devised a scheme as described by Pelletier, the evidence clearly shows that Zweifel was doing everything possible to ensure its failure.";

p.1507: "... according to Pelletier, he would not have purchased the Hurst Group's stock 'without such promises and guarantees [of certain financial and managerial controls].' Pelletier alleges that Zweifel

9. But the evidence indicates that Zweifel did know this prior to the meeting. See, e.g., Plaintiff's exhibit 40 (letter from Zweifel); see also Plaintiff's exhibit 20.

counseled Culpepper to make such a promise. Furthermore, he alleges that he would not have purchased the stock had he known the extent of the Hurst Group's misappropriation of funds from the company -- a fact well known by Zweifel at the time Pelletier purchased the stock. On their face, these allegations seem reasonable and, if true, would likely satisfy section 1964(c)'s proximate cause requirement. Unfortunately for Pelletier, they are not true." (emphasis supplied);

p.1508: "Pelletier must have realized that his oral understanding with Culpepper was unenforceable.";

"Pelletier went into this transaction with his eyes wide open: he took a chance that did not pay off.";

p.1509: "He [Pelletier] did not rely on the alleged misrepresentations and therefore cannot claim that his injury was proximately caused by Culpepper's fraudulent scheme.";[10]

"Obviously, Pelletier based his estimate of the company's value solely on the amount of sales it had been generating. He did not care that the owners had been draining funds from the company through the company's expense accounts."

In context, the Court of Appeals' determination of frivolity is difficult to accept. Although the panel made it exquisitely clear in over 60 pages of analysis that it thought that Messrs. Schlanger and Pelletier should have better parsed the statute and should have known that their RICO claims against Mr. Zweifel could not succeed, and then harshly criticized them for reading RICO broadly, this Court has held that a "pinched construction" of RICO is inappropriate, that "legitimate businesses 'enjoy neither an inherent incapacity for criminal

10. But see, to the contrary, the testimony of Pelletier, Pelletier depo., pp. 65-67; 106-109; 34-35.

activity nor immunity from its consequences'" and that, although "RICO may be a poorly drafted statute ...[,] rewriting it is a job for Congress, if it is so inclined, and not for this Court." H.J., Inc. v. Northwestern Bell Telephone Co., 109 S.Ct. 2893, 2905 (1989).

Indeed, four Justices joined in an opinion that stated that even they are not sure what would constitute a violation of the RICO Act. See, H.J., Inc., 109 S.Ct. at 2907-2908 (Scalia, J., concurring):

> Today, four years [after Sedima] and countless millions in damages and attorney's fees later (not to mention prison sentences under the criminal provisions of RICO), the Courtdoes little more than repromulgate those hints as to what RICO means.... This seems to me about as helpful to the conduct of [the lower courts'] affairs as "life is a fountain." ...
>
> It is, however, unfair to be so critical of the Court's effort because I would be unable to provide an interpretation of RICO that gives significantly more guidance concerning its application.

Although the Court of Appeals' scathing opinion has had the desired deterrent effect (even without the enormous monetary sanction),[11] it is not beyond argument that imposition of sanctions in a context where even Justices of this Court are uncertain about the parameters of the statute is neither

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11. Attorney Schlanger will almost certainly never file another RICO suit and has now had to deal with the specter of the Eleventh Circuit's opinion in almost every federal court case he files on behalf of a plaintiff.

appropriate nor just and that Messrs. Pelletier and Schlanger are being sanctioned for being wrong, not for being frivolous.

Certiorari should be granted to insure that Rule 11 is not used in circumstances where the law is unclear and the facts complex, so that its application will not, as the Court of Appeals' opinion is certain to, chill the creativity or zealousness of attorneys in advocating their clients' claims.

CONCLUSION

For all of the foregoing reasons, this Court should issue a wirt of certiorari, vacate the Court of Appeals' opinions, reverse the Court of Appeals' order mandating imposition of Rule 11 sanctions, and remand the case to the district court for further proceedings.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have, this 12 day of August, 1993, served all counsel of record with the foregoing PETITION FOR WRIT OF CERTIORARI by depositing three copies in the U.S. Mail in a envelope with sufficient postage affixed to insure delivery and addressed to:

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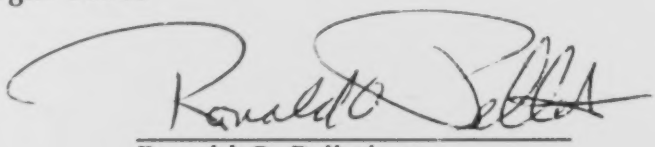

Ronald O. Pelletier
Pro Se

Appendix

1. Order of the District Court on Motion for Summary Judgment App. 1

2. Order of the District Court on Motion for Sanctions App. 15

3. Order of the District Court imposing Sanctions as directed by the Court of Appeals App. 18

4. Opinion of the Court of Appeals, March 18, 1993 App. 24

5. Order of the District Court on remand, March 22, 1993 App. 30

6. Order of the Court of Appeals denying re-hearing, May 14, 1993 App. 31

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RONALD O. PELLETIER	:	
	:	CIVIL NO.
vs.	:	1:86-CV-156-ODE
GARY D. ZWEIFEL	:	(Filed AUG 11, 1988)
	:	

ORDER

This action is before the court on motion by Defendant for summary judgment. Plaintiff charges that Defendant violated §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, the Georgia equivalent of §10(b) and Rule 10b-5, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). As predicate acts under RICO Plaintiff alleges that Defendant engaged in mail fraud in violation of 18 U.S.C. §1341, wire fraud in violation of 18 U.S.C. §1343, fraud in violation of 18 U.S.C. §1952; bankruptcy fraud in violation of 18 U.S.C. §152, securities fraud under §10(b) of the Securities Exchange Act, and intimidation of a federal witness in violation of 18 U.S.C. §1503. Defendant moves for summary judgment on all of these claims.[1]

Plaintiff Ronald O. Pelletier is a former investor in Buckhead House of Travel, a travel agency. Defendant

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[1] In its order dated January 6, 1988, the court allowed Plaintiff to revive his claim of bankruptcy fraud, but denied Plaintiff leave to add a claim under the Georgia analog to RICO. Defendant filed a counterclaim for abuse of litigation under Georgia law, the substance of which is not addressed in the instant motion.

Gary D. Zweifel is an Atlanta attorney who at relevant times acted as counsel to Buckhead House of Travel. The gist of Pelletier's claims herein is that Zweifel knowingly aided C. M. Culpepper, president and part owner of Buckhead House of Travel, in deceiving Mr. Pelletier in connection with Pelletier's purchase of shares of stock in Buckhead House of Travel from Pelham H. Robinson, W. Leon Hurst, and William C. Hurst (hereinafter collectively "the Hurst Group"). Because the record reflects that Pelletier's purchase of the Hurst stock occurred before he had any dealings with Zweifel, and also because the record reflects that Zweifel did not assist Culpepper in negotiating with Pelletier prior to Pelletier's purchase of the Hurst stock, Defendant's motion for summary judgment on the securities claims will be granted. Also, Defendant's motion will be granted as to Plaintiff's RICO claims for the reasons stated below.

In the late 1970's and early 1980's, the 100 outstanding shares of Buckhead House of Travel were owned equally by Clyde M. Culpepper and Leroy Langston.[2] Culpepper actively ran the business; Langston was inactive. Although the agency generated very substantial revenues, it was in a constant state of turmoil due to financial mismanagement by Mr. Culpepper. In the fall of 1983, one such financial emergency occurred when Culpepper was notified by IRS that the company owed $43,000 in overdue FICA taxes. Culpepper and Langston were unable to agree on a method of raising the cash for

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[2] Langston's wife had an interest in some of the shares; for ease of reference the shares will be referred to as belonging to Mr. Langston only.

IRS. Ultimately, Langston agreed that he would sell some of his shares to raise cash, so long as Culpepper would sell an equivalent number of his shares.

It is not clear how the Hurst Group, which then purchased shares, came in contact with Culpepper and Langston. In any event, on October 7, 1983, a written agreement was executed between Culpepper, Langston, and the Hurst Group whereby Culpepper and Langston each would sell 40 shares of stock to the Hurst Group. Shortly thereafter, Langston transferred his 40 shares in exchange for a check for the agreed purchase price. However, Culpepper made no transfer. It is unclear what happened; this issue has not been directly addressed in the parties' briefs. Culpepper's own version is that his inclusion in the contract of sale was merely a ruse to get Langston to sell his shares, and that the Hurst Group knew and agreed all along that Culpepper would not have to sell any shares. In any event, Culpepper remained as president of Buckhead House of Travel after October, 1983, and continued to run the business.

However, various emergencies occasioned by cash shortages continued to occur. The relationship between the Hurst Group and Mr. Culpepper was strained, to say the least. Each accused the other of acts of fraud and mismanagement. The situation was awkward, because the corporation was deadlocked. The Hurst Group had formed a liaison with Langston, but Culpepper still was the record owner of 50% of the shares.

In the fall of 1984, the Hurst Group negotiated with Wilbur Brown, the owner of a rival travel agency, to sell their shares in Buckhead House of Travel. At about the

same time, the Hurst Group asserted, through their attorney, that Culpepper had breached the October 7, 1983 contract to sell his shares to them. Culpepper consulted Defendant Gary D. Zweifel, partner with the Atlanta law firm of Lokey and Bowden concerning these allegations. Lokey and Bowden had been retained as corporate counsel for Buckhead House of Travel earlier in 1984. Lokey and Bowden had had nothing to do with the 1983 Hurst/Langston/Culpepper contract.

In September, 1984, Brown offered to buy Culpepper's shares. Culpepper and Zweifel indicated Culpepper would consider the matter.

On November 1, 1984, the Hurst Group executed an agreement whereby they sold all of their shares in Buckhead House of Travel to Travel Incorporated, Wilbur Brown's company. The contract expressly provided that if Brown was unable to effect a purchase of an additional 50% of the stock (presumably from Culpepper) within 180 days of his purchase of the Hurst Group's shares, Travel Incorporated would have the right to rescind. In the November 1, 1984 contract, the Hurst Group conditionally assigned to Travel Incorporated all causes of action they had against Culpepper growing out of the aborted 1983 transaction.

On November 9, 1984, two members of the Hurst Group filed suit against Culpepper in the State Court of Fulton County seeking both specific performance as to the 1983 agreement and damages against Culpepper. The record does not make it clear whether the filing of this suit was related to Wilbur Brown's stock purchase, but the court infers that it was.

Sometime in late November or early December, 1984, it became clear to Wilbur Brown that Culpepper was not going to sell his shares in Buckhead House of Travel. Accordingly, Brown contacted Pelham Robinson, a member of the Hurst Group, and told him they might as well go ahead and sell their stock to somebody else. At that point, the Hurst Group got in touch with Ronald O. Pelletier, Plaintiff herein. Mr. Pelletier, like Wilbur Brown, owned an interest in a rival travel agency.

Pelletier began negotiating with the Hurst Group and with Culpepper in mid-December, 1984. He offered to buy the Hurst Group's shares but not Culpepper's. He told Culpepper he was interested in buying the Hurst Group's shares, and would infuse capital into the corporation, but only if Culpepper would relinquish certain managerial and financial control functions. According to Pelletier, Culpepper verbally agreed to do this.[3] The record contains no evidence that Zweifel participated in any meetings at this point with Pelletier; the record reflects that Zweifel did not advise Culpepper in this matter prior to January 8, 1985.

On December 29, 1984, a written agreement between Pelletier and the Hurst Group was executed whereby the Hurst Group sold its 40 shares to Pelletier for $150,000.

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[3] Culpepper may disagree with Pelletier's version of these facts. Culpepper testified that (1) he first talked with Pelletier after Pelletier bought his stock; (2) he first talked to Pelletier when Pelletier had an option to buy the stock. Culpepper's deposition testimony does not specify exactly what, if anything, Culpepper felt he had agreed to do to induce Pelletier to buy stock.

Additionally, the Hurst Group assigned to Pelletier its causes of action in the then-pending state court law suit growing out of the aborted 1983 transaction. The agreement explicitly stipulated that it was not to be disclosed to Culpepper.

On January 8, 1985, Culpepper went to a meeting at the offices of Pelletier's counsel, Alston & Bird. Culpepper took Defendant Zweifel with him. Pelletier's counsel had prepared a draft of an agreement reflecting Culpepper's acquiescence in Pelletier's financial management of the corporation. Culpepper read the draft agreement, and refused to sign it.[4] This development angered Pelletier, who on January 3 had personally guaranteed a $100,000 line of credit for Buckhead House of Travel, $30,000 of which had already been drawn down.

The agreement which Culpepper refused to sign maintained him as titular president of the corporation, but drastically limited his prerogatives in financial matters. For example, he could not authorize payment of any expenses exceeding $1,000. The agreement fixed Culpepper's salary and reimbursable expenses at set amounts. It specifically provided that Culpepper's wife and son would continue as employees, but on specified terms and conditions, including that they each work at least 40 hours a week. The agreement called for Culpepper to warrant that he was the owner of 50 shares of stock in the corporation, and that the stock was free from claims by

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[4] Culpepper's deposition testimony suggests, but does not make clear, that he generally felt that the document gave too much control to Pelletier. Culpepper was not asked what specific parts of the proposal he objected to.

others.[5] Liquidated damages of $50,000 were specified should any of the representations be false.

Although the proposed agreement recited that it was in anticipation of the possibility that Pelletier might purchase the shares of the Hurst Group, in reality Pelletier had already bought the shares and was in a position to assert the rights of the Hurst Group to Culpepper's stock in the pending state court litigation. If Pelletier had been successful in this litigation, then he would own 80% of the shares, with Langston and Culpepper each owning 10%.

After the aborted January 8, 1985 meeting, accusations and counter accusations were swapped as between Culpepper and his counsel on the one hand and Pelletier and his counsel on the other hand. Several days after January 8, 1985, Pelletier announced to Culpepper and Zweifel that he had purchased the Hurst Group shares; he demanded to be recognized as a shareholder of record. At this point, Defendant Zweifel pointed out (correctly) that all of the shares of the corporation bore a restrictive legend such that under the charter and by-laws, the shares could be transferred only with the approval of 75% of the board of directors, which could not be obtained. The board only had three members: two members of the Hurst Group and Mr. Culpepper.

In mid-January, 1985, Pelletier and Langston filed a lawsuit in the Superior Court of Fulton County against the corporation, Culpepper, and William and Charles

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[5] Of course, Pelletier knew the stock was encumbered by the claims he had just purchased.

Hurst. The lawsuit sought the appointment of a receiver for the corporation, citing corporate deadlock; it sought the appointment of a provisional director and damages from Culpepper.[6]

On January 16, 1985, a temporary restraining order was entered against Buckhead House of Travel and Clyde Culpepper essentially enjoining them from dissipating corporate assets. The same day, a consent order was entered essentially reflecting the provisions of the previously entered restraining order and providing that Pelletier and those affiliated with him should have immediate access to the books and records of Buckhead House of Travel.

The discovery contemplated by the consent order did not go smoothly. For example, Pelletier's counsel were told while they were on the company premises on January 17 that they could not use the restroom, use the telephone, or have any coffee. They were relegated to an unheated room. Counsel for Buckhead House of Travel, Defendant Zweifel, placed various conditions on the review of records which had not been contemplated by the court order requiring that the documents be made available.

During February, 1985, various corporate meetings were attempted; none were successful due to the deadlocked status of the corporation.

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[6] Clyde Culpepper was represented in this lawsuit by Gary P. Bunch, an attorney with the law firm of Thrasher and Whitley, and also by Nickolas P. Chilivis, an attorney with the law firm of Chilivis and Grindler.

On March 13, 1985, an evidentiary hearing was held in the Superior Court of Fulton County on plaintiff's request for further temporary injunctive relief. The court entered an order which essentially relieved Mr. Culpepper of managerial control and appointed one James Lurwig to manage the company. Immediately after the court had announced its ruling, counsel for Buckhead House of Travel stated that it had just filed a bankruptcy petition for Buckhead House of Travel in the Bankruptcy Court for the Northern District of Georgia, seeking reorganization for the company. The corporate officer authorizing that decision was Clyde Culpepper.

Buckhead House of Travel was represented in the reorganization proceedings by Donald Rickertsen of the law firm of Bisbee, Parker and Rickertsen. Mr. Rickertsen prepared and filed the bankruptcy petition, and generally represented the debtor throughout the proceedings which concluded in 1986. In February, 1986, a plan of reorganization was confirmed by the bankruptcy judge. This plan called for all of the stock of Buckhead House of Travel to be transferred to a corporate purchaser which would pay $125,000 in cash. The bulk of Buckhead House of Travel's assets would be retained within the bankruptcy court's jurisdiction and liquidated for the benefit of Buckhead House of Travel creditors. The plan noted that the purchaser of the stock planned to operate a travel business and might employ Mr. Culpepper as a salesman. Apparently, the plan was consummated.

The following claims are now before the court on Defendant's motion for summary judgment. First, Plaintiff claims Defendant is liable under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.

§1961 *et seq.* Secondly, he claims Defendant violated §10b(5) of the Securities Act of 1934, 15 U.S.C. §78j(b), and Rule 10b-5 promulgated thereunder, as well as the Georgia analog, O.C.G.A. §10-5-12(a)(2).

Plaintiff's referenced securities claims are premised on the theory that Clyde Culpepper made material misrepresentations to Pelletier in connection with Pelletier's purchase of the Hurst Group stock. Specifically, Pelletier contends that Culpepper misrepresented that he was willing to give up financial control of the corporation, when in reality he was not. Plaintiff then asserts that Defendant Zweifel, as counsel to Culpepper, knowingly aided Culpepper in perpetrating this deception.

Assuming that Culpepper in fact was seeking to deceive Pelletier so that Pelletier would infuse capital into the corporation, the record wholly fails to support Plaintiff's claim that Defendant Zweifel was a knowing participant in this scheme. All of the direct contacts which Pelletier had with Zweifel began on January 8, 1985, more than a week after Pelletier had purchased the Hurst Group stock and paid $150,000 for it. Secondly, the record simply does not support a contention that Zweifel gave Culpepper advice or assistance in any representations Culpepper may have made to Pelletier before Pelletier purchased the stock. Thus, it cannot be said that any misrepresentations for which Zweifel might be responsible were made "in connection with" Pelletier's purchase of the stock as the express language of the referenced federal and state statutes literally require. Furthermore, nothing that Defendant Zweifel did after he began dealing directly with Pelletier constituted misrepresentation, manipulation, or deception. While it is true

that Zweifel refused to cooperate with Pelletier, there was no actual or attempted misrepresentation involved.

The Plaintiff's argument appears to be that Defendant Zweifel must have realized that Culpepper had tricked Pelletier into buying the Hurst Group stock, once Zweifel learned of Pelletier's purchase. The reason Plaintiff argues Zweifel must have so realized is that Culpepper (presumably) had previously told Zweifel of the ruse perpetrated on Langston in 1983; Zweifel therefore was on notice that Culpepper probably was trying to trick Pelletier as well. Therefore, when Zweifel aided Culpepper by advising him at the January 8 meeting and by resisting the recognition of Pelletier as a shareholder of record, he committed securities fraud.

The court does not accept this reasoning. In the first place, as noted, Pelletier had already bought his stock; the actions taken by Zweifel did not affect that sale. Furthermore, even if Zweifel knew or suspected that Culpepper had tricked Langston in 1983, this would be insufficient to impart knowledge to Zweifel that the proposed written agreement reflected the terms of any verbal agreement Culpepper and Pelletier might have made previously. Zweifel had not been a party to the negotiations between Culpepper and Pelletier, and had no knowledge of the details.

Pelletier's RICO claims actually consist of four separate claims brought under each of the following sections: 18 U.S.C. §1962(a); 18 U.S.C. §1962(b); 18 U.S.C. §1962(c); 18 U.S.C. §1962(d). In essence, §1962(a) proscribes the use of funds derived from a pattern of racketeering activity in an enterprise; §1962(b) proscribes the maintenance of an

interest in an enterprise through a pattern of racketeering activity; in an enterprise through a pattern of racketeering activity; §1962(d) proscribes conspiracy to violate subsections (a), (b), or (c).

The term "pattern of racketeering activity" is a defined term under RICO. Specifically, 18 U.S.C. §1961(1) sets out precisely which criminal acts may be deemed "racketeering activity"; §1961(5) states that a "pattern" requires at least two acts of "racketeering activity."

The complaint herein alleges that Defendant Zweifel committed violations of the following criminal statutes which constitute acts of "racketeering activity" under §1961(1): 18 U.S.C. §1341 (mail fraud); 18 U.S.C. §1343 (wire fraud); 18 U.S.C. §1952 (use of interstate facilities to distribute proceeds of "unlawful activity" or to promote or carry on "unlawful activity"); 18 U.S.C. §152 (bankruptcy fraud).

Neither wire fraud nor mail fraud is a viable predicate act, *i.e.*, act of racketeering activity, for the instant RICO claims. That is because both wire fraud and mail fraud are premised on a knowing attempt to deceive. As previously stated, the record simply fails to support Plaintiff's claim that Mr. Zweifel knew facts which placed him on notice that Clyde Culpepper was seeking to swindle Mr. Pelletier, and that Zweifel then elected to assist Culpepper.

The alleged violations of 18 U.S.C. §1952 are not viable predicate acts because there was no "unlawful activity" as defined by 18 U.S.C. §1952(b). Plaintiff apparently asserts that Zweifel committed extortion, which does constitute "unlawful activity" for purposes of §1952,

but the record reflects that Zweifel did not extort any money or property from Pelletier, or assist Culpepper in doing so. The record is clear that the $150,000 was obtained by the Hurst Group, not by Culpepper or Zweifel. Neither did Zweifel assist the Hurst Group in any manner.

18 U.S.C. §152, proscribing concealment of assets, false oaths and claims and bribery in the context of a bankruptcy proceeding does not apply as a predicate act under the facts shown by the evidence. While Plaintiff contends that various individuals made misrepresentations to the bankruptcy court during the pendency of the proceedings, there is no evidence that Defendant Zweifel had any connection to any of them. Neither Zweifel nor Lokey and Bowden were active in the bankruptcy proceedings. Neither does the evidence permit an inference that Don Rickertsen, attorney for the debtor, was acting as a pawn for Lokey and Bowden or Defendant Zweifel.[7]

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[7] Plaintiff's first amended complaint also alleged a violation of 18 U.S.C. §1503 as a RICO predicate act. In its order entered January 9, 1987, the court dismissed the allegations of violation of §1503. It did so in error, as this section generally proscribes obstruction of justice, not merely tampering with a juror or court officer. The Plaintiff seeks to assert that Defendant Zweifel violated this section when he spoke harshly to Emily Langston, wife of Leroy Langston. Plaintiff's theory is that Zweifel should have realized that Mrs. Langston probably would be a witness in a legal proceeding affecting Buckhead House of Travel, and that he intended to intimidate her. However, to sustain a claim that Zweifel violated this statute, Pelletier would be required to show that Zweifel threatened Mrs. Langston "knowing of a pending judicial proceeding" in

(Continued on following page)

Because the record fails to support Plaintiff's claim that Defendant Zweifel committed any of the criminal acts which allegedly constitute a "pattern of racketeering activity," there is no "pattern of racketeering activity." Neither is there evidence that Zweifel agreed or attempted to commit a violation. Hence, there are no actionable RICO violations.

Because the evidence does not support Plaintiff's claims of securities fraud or RICO violations, Defendant's motion for summary judgment is GRANTED.

SO ORDERED, this 11 day of August, 1988.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES
DISTRICT JUDGE

(Continued from previous page)

which she was likely to testify and "specifically intended to impede its administration." *United States v. Guzzine*, 810 F.2d 687 (7th Cir. 1987). As there is no showing that Zweifel had any specific reason to think that Mrs. Langston was about to testify in a particular legal proceeding, and his remarks to her made no specific mention of any pending proceeding, there is no violation of this statute as a matter of law.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RONALD O. PELLETIER	:	CIVIL NO.
	:	1:86-CV-156-ODE
vs.	:	FILED
GARY D. ZWEIFEL	:	JUL 10 1989

ORDER

This civil suit for damages is before the court on Defendant's motion pursuant to Rule 11 of the Federal Rules of Civil Procedure for an award of reasonable attorney's fees and expenses. On August 11, 1988, this court entered summary judgment in Defendant's favor. Having read and considered the Defendant's motion and brief, as well as Plaintiff's response thereto, the motion is hereby DENIED.

Rule 11, Federal Rules of Civil Procedure, provides in pertinent part as follows:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in

> violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Although the pivotal inquiry is whether Plaintiff's complaint as amended was, to the best of his attorney's knowledge, information and belief after reasonable inquiry "well grounded in fact and warranted by existing law", Defendant's motion does not specifically address this factor. Rather, Defendant's motion simply sets out his version of the facts which he believes compelled the conclusion that he was entitled to prevail. Defendant does not address exactly which of the facts set forth in Plaintiff's extremely fact specific complaint were wrong, or why Plaintiff's counsel should have known that they were wrong. Neither does he specifically point out any allegations in the complaint which are misleading by reason of omission of facts which should have been available to Plaintiff's counsel through reasonable inquiry. The court's impression is that many of the discrete facts specifically pled in the complaint are true; nonetheless, the inference sought by Plaintiff, namely, that the Defendant was a knowing participant in a fraudulent scheme along with one C. M. Culpepper, is not warranted by the evidence as presented by Defendant's motion for summary judgment and Plaintiff's response thereto. Plaintiff's theory seemed to be that because of actions of Defendant of an over-reaching nature, it could be inferred that he was

not merely acting as a professional advisor for Mr. Culpepper. However, there was no evidence that the Defendant participated in or had knowledge of the specific negotiations between Mr. Culpepper and the Plaintiff which were the basis for Plaintiff's claims of fraud. That being the case, the Defendant was entitled to the grant of the motion for summary judgment, but the Rule 11 motion must be denied.

The court can well understand the Defendant's outrage at being charged with being a "racketeer." However, Plaintiff cannot be faulted for the fact that Congress enacted legislation which allows such a claim to be made against an individual who by no stretch of the imagination would be thought of as a racketeer by any intelligent member of the public.

In summary, the Defendant's motion for Rule 11 sanctions is hereby DENIED.

SO ORDERED, this 10 day of July, 1989.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RONALD O. PELLETIER	:	
	:	
vs.	:	CIVIL NO. 1:86-cv-156-ODE
	:	
GARY D. ZWEIFEL	:	

ORDER

This civil action is before the court on Defendant's amended motion for sanctions and Plaintiff's counsel's motion for an evidentiary hearing and re-determination of appropriate sanctions.

This case is presently on remand from the Eleventh Circuit Court of Appeals. By order dated August 11, 1988, this court granted Defendant's motion for summary judgment. By order dated July 10, 1989, this court denied Defendant's motion for an award of sanctions pursuant to Fed. R. Civ. P. 11. The parties appealed these rulings. In Pelletier v. Zweifel, 921 F. 2d 1465 (11th Cir. 1991), the Eleventh Circuit affirmed the grant of summary judgment to Defendant and reversed and remanded with instructions the denial of Defendant's motion for Rule 11 sanctions.

The Court of appeals held that the conduct of Plaintiff, Ronald Pelletier, and Plaintiff's counsel, Herbert Schlanger, warranted sanctions under both Rule 11 and Fed. R. App.P. 38.[1] The Court held that such sanctions should be imposed jointly and severally on Mr. Pelletier and Mr. Schlanger. As regards Rule 11 sanctions, the court instructed:

1. Fed.R.App.P. 38 allows the imposition of sanctions for the filing of a frivolous appeal

> With respect to the amount of the sanction, we direct the district court, upon receipt of our mandate, to award Zweifel a sum of money that will compensate him for the attorney's fees, litigation expenses, and costs he incurred in defending this lawsuit in the district court and in prosecuting his motion for Rule 11 sanctions. Such award shall take into account any fees, expenses, and costs Zweifel may incur, on remand, in obtaining the award.

Pelletier, 921 F.2d at 1522.[2] As regards sanctions under Rule 38, the Eleventh Court stated:

> We do not hesitate one whit in awarding Zweifel double costs and a reasonable attorney's fee for opposing Pelletier's appeal. [citation omitted]. On remand, the district court shall determine the amount of that fee and give Zweifel judgment for the full amount thereof against Pelletier and Schlanger, jointly and severally [footnote omitted].

Id. at 1523.

On July 9, 1991, following remand of this action, the court held a hearing regarding the imposition of sanctions against Pelletier and his counsel. At this hearing,the court sought to determine the scope of its responsibilities under the Eleventh Circuit's opinion in Pelletier. The parties agreed that the court's only task upon remand is to determine the amount of "the attorney's fees, litigation expenses, and costs [Defendant] incurred in defending this lawsuit in the district court and in prosecuting his motion for Rule 11 sanctions" and the amount of "double costs and a reasonable attorney's fee for opposing Pelletier's appeal." Transcript of July 9, 1991 Hearing, pp. 8, 10, 15 ("Transcript"). The parties specifically agreed that Pelletier does not permit this court to consider evidence concerning the financial situations of Mr. Pelletier and Mr.

2. See also id. at 1470 ("We accordingly remand the case for the imposition of such sanctions as will recompense Zweifel for the expenses that he incurred, including attorney's fees, in defending this suit in the district court.").

Schlanger or the amount of sanctions necessary to deter them from filing baseless claims. Id. at 6-8, 10, 17-19. The court concurs with the parties interpretations of Pelletier.

With respect to Rule 38 sanctions, Defendant has submitted evidence establishing that double costs associated with opposing Plaintiff's appeal amount to $265.00 and that a reasonable attorney's fee for opposing that appeal amounts to $18,053.50, a total of $18,318.50. Defendant states that, in accordance with the Eleventh Circuit's mandate, this total does not include amounts he expended in prosecuting his appeal form this court's denial of his motion for Rule 11 sanctions. Pelletier, 921 F.2d at 1523 n. 104. Plaintiff and his counsel have not in any way contested the reasonabl eness of the amount of Rule 38 sanctions sought by Defendant. The court thus awards Defendant $18,318.50 in Rule 38 sanctions.

As regards Rule 11 sanctions, the court's task is much more complicated. The parties have taken such extreme positions regarding the amount of "the attorney's fees, litigation expenses, and costs [Defendant} incurred" in defending this action and in prosecuting his motion for Rule 11 sanctions that the court is in an extraordinarily difficult situation.

Mr. Pelletier and Mr. Schlanger argue that the term "incurred" refers to "'actual fees which the subject has paid or for which he is liable.'" In re Olson, 884 F.2d 1415, 1422 (D.C. Cir. 1989) (quoting In re Donovan, 877 F.2d 982, 991 (D.C. 1989)) (construing attorney's fees provision of Ethics in Government Act). Plaintiff and his counsel thus contend that the Eleventh Circuit awarded Defendant only his actual out-of-pocket expenses as Rule 11 sanctions. Transcript, p. 4. As Mr. Schlanger has noted, the record contains no evidence that the Defendant paid any expenses in this action. Defendant's counsel states that the insurance carrier for Lokey & Bowden, Defendant former firm, paid all of the expenses associated with the defense of this action and the prosecution of the

motion for Rule 11 sanctions. Id. at 12-14.[3] Mr. Pelletier and Mr. Schlanger have offered no objection to the hourly rate requested by Defendant's counsel or to the amount of hours Defendant's counsel claims were reasonably expended in defending this action. In fact, Plaintiff and his counsel have expressly conceded that neither the hourly rate nor the hours expended are excessive. Id. at 1,3.

Defendant contends that the term "incurred" refers to all expenses necessitated by the filing of this action, regardless of whether he bore those expenses directly. Defendant has submitted evidence establishing that the attorney's fees, litigation expenses, and costs necessitated by the filing of this action and the prosecution of his motion for Rule 11 sanctions amount to $282,837.96 ($267,817.96 requested in amended motion for sanctions + $15,020.00 requested in Supplemental Statement). Defendant argues that, because Plaintiff and his counsel have not contested the reasonableness of this amount, the court only has discretion to award him $282,837.96 as Rule 11 sanctions. Id. at 15.

Plaintiff contends that the amount of "the attorney's fees, litigation expenses, and costs [Defendant] incurred" is zero. Defendant contends that he "incurred" attorney's fees, litigation expenses, and costs of $282,837.96. Plaintiff's position is clearly inconsistent with the former tenor of the Eleventh Circuit's opinion in Pelletier and its manifest expectation that the district court would award "monetary sanctions" under Rule 11. 921 F.2d at 1521. Defendant's position, however, requires the court to impose sanctions in excess of $280,000 without considering the impact of those sanctions on plaintiff and his counsel or the necessity of such a large award. In resolving the dispute between the parties, the court is mindful of both its obligation to implement the spirit of the Court of Appeals' directive.

The court finds that the term "incurred", as used in the Eleventh Circuit's opinion in Pelletier, refers to expenses

3. Lokey & Bowden paid the deductible required by the insurance company. Transcript, p. 14.

actually paid by the Defendant or for which he is liable. The court reaches this conclusion for two reasons. First,the court finds persuasive the decision of the D.C. Circuit Court of Appeals in In re Olson, 884 F.2d 1414, 1422 (D.C. Cir. 1989). The cases cited by Defendant do not bear directly on the meaning of the term "incurred", but rather concern general policy considerations under various attorneys' fees statutes.

Second, the language used by the Eleventh Circuit in Pelletier supports Mr. Pelletier and Mr. Schlanger's contention that the Court of Appeals intended to award Defendant his out-of-pocket expenses. The Eleventh circuit's use of the term "compensate" suggests that the Court intended to reimburse Defendant for those expenses he bore directly. See also supra note 2 (court uses term "recompense"). Furthermore, the language of Rule 11 specifically refers to all expenditures necessitated by the filing of an action. The Eleventh Circuit chose to not use this language, but rather to award Defendant the expenses he incurred "in defending this lawsuit in the district court and in prosecuting his motion for Rule 11 sanctions." This narrower language suggests that the Court was awarding Defendant his actual expenses.

To the extent that Defendant did not directly bear any of the financial costs of this action, he "incurred" no expenses within the meaning of the Eleventh Circuit's opinion in Pelletier. However, the Eleventh Circuit clearly contemplated that Mr. Pelletier and Mr. Schlanger would be required to pay significant monetary sanctions in this case. The Court of Appeals found that "Pelletier's complaint had no adequate factual basis and was filed in bad faith." 921 F.2d at 1515. Furthermore, the Eleventh Circuit stated, "Monetary sanctions plainly are warranted in this case. All of the claims Pelletier made clearly fall below the standard of reasonableness required by Rule 11." Id at 1521. In such circumstances, it would be highly inappropriate for this court to fail to award Rule 11 sanctions

against Plaintiff and his counsel. Thus, in order to give effect to the Eleventh Circuit's opinion in Pelletier, the court awards Defendant $25,000 in sanctions under Rule 11.

As a final matter, Mr. Schlanger's motion for an evidentiary hearing and re-determination of appropriate sanctions is DENIED. In that motion, Mr. Schlanger urges the court to conduct an evidentiary hearing regarding the appropriate amount of sanctions it should award against him. This motion is based on recent changes in Mr. Schlanger's financial condition. However, as noted above, Mr. Schlanger has conceded, and the court finds, that the Eleventh Circuit's opinion in Pelletier does not permit it to conduct a hearing regarding the impact of Rule 11 sanctions on plaintiff and his counsel.

Accordingly, Defendant amended motion for sanctions and attorney's fees [87-1 87-2] is GRANTED IN PART and DENIED IN PART. plaintiff's counsel's motion for an evidentiary hearing and re-determination of appropriate sanctions [94-1] is DENIED. The Defendant Gary D. Zweifel shall have judgment of Mr. Pelletier and Mr. Schlanger, jointly and severally, in the sum of $43,318.50.

SO ORDERED, this 26 day of March, 1992.

/s/
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-8630
Non-Argument Calendar

D.C. Docket No. 1:86-cv-156-ODE

RONALD O. PELLETIER,

Plaintiff-Appellee,
Cross-Appellant,

versus

GARY D. ZWEIFEL,

Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Georgia

(March 18, 1993)

Before TJOFLAT, Chief Judge, ANDERSON, Circuit Judge, and JOHNSON, Senior Circuit Judge.PER CURIAM:

I. In this appeal, Gary D. Zweifel Seeks enforcement of the mandate we issued in Pelletier v. Zweifel, 921, F.2d 1465 (11th

Cir.) (Pelletier I), reh'g denied, 931 F.2d 901 (11th Cir.), cert. denied, _____ U.S. _____, 112 S.Ct. 167 (1991). This panel affirmed the district court's dismissal, under Fed. R. Civ. P. 12(b) (6) and 56, of Ronald O. Pelletier's claims. Id. at 1495.[1] We reversed, however, the district court's decision denying Zweifel relief under Fed. R. Civ. P. 11,[2] concluding that monetary sanctions were in order. Id. at 1521-23. We did so because Pelletier's claims against Zweifel were utterly baseless. We explained that "all of the claims Pelletier made clearly fall below the standard of reasonableness required by Rule 11. While these claims were frivolous when made, they became even more so as discovery proceeded and it became apparent that Pelletier's own evidence contradicted his factual allegations. . . . " Id. at 1521. We concluded that "Pelletier's complaint had no reasonable factual basis when pled and that Pelletier and [his lawyer, Herbert P.] Schlanger knew this. When they decided to pursue this action despite their knowledge that it was frivolous, they acted in bad faith . . . ." Id. at 1515. We remanded the case to the district court, and directed the court

> to award Zweifel a sum of money [against both Pelletier and Schlanger, jointly and severally] that will compensate him for the attorney's fees, litigation expenses, and costs he incurred in defending this lawsuit in the district court

---

1. A detailed exposition of Pelletier's claims and the facts underpinning them may be found in Pelletier I, 921 F.2d at 1470-95.

2. Rule 11 provides in relevant part:

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, Modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unecessary delay or needless increase in the cost of litigation... If a pleading, motion, or other paper is in violation of this rule, the court, upon motion or uponits own initiative, shall impose upon the person who signed it, a represented party, or both, an apprpriate sanction...

Fed. R. Civ. P. 11 (emphasis added)

> and in prosecuting his motion for Rule 11 sanctions. Such award shall take into account any fees, expenses, and costs Zweifel may incur, on remand, in obtaining the award.

Id. at 1522.

Because Pelletier's appeal was also patently frivolous, we awarded Zweifel, under Fed. R. App. P. 38,[3] "double costs and a reasonable attorney's fee for opposing Pelletier's appeal." Id. at 1523. We directed the district court, on remand, to "determine the amount of that fee and give Zweifel judgment for the full amount thereof against Pelletier and Schlanger, jointly and severally." Id.

At the hearing convened to implement Pelletier I's mandate, Zweifel established that he incurred $282,837.96 in attorney's fees, litigation expenses, and costs in defending the case in the district court, and $18,318.50 on appeal. Pelletier and Schlanger did not challenge the reasonableness of these amounts. Instead, they argued that Zweifel was entitled to recover nothing because he had "incurred" no litigation expenses at all; rather, his insurance company had incurred and paid the expenses. Pelletier and Schlanger supported their argument with the following language (a portion of which we have quoted supra) from Pelletier I: "with respect to the amount of the sanction, we direct the district court, upon receipt of our mandate, to award Zweifel a sum of money that will compensate him for the attorney's fees, litigation expenses, and costs he incurred in defending this lawsuit in the district court . . . ." Id. at 1515 (emphasis added).

This purely semantic argument convinced the district court, and it awarded Zweifel nothing for the litigation expenses that his insurance carrier expended on his behalf in the district court. The court felt that some sanction was warranted under Rule 11, however, and fined Pelletier $25,000 for his

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3. Fed. R. App. P. 38 provides that [i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

conduct at the trial level. Turning to our direction that it award Zweifel double costs and reasonable attorney's fees under Fed. R. App. P. 38, the district court awarded Zweifel $18,318.50 ($265.00 in double costs, and $18,053.50 in attorney's fees) against both Pelletier and Schlanger. Zweifel appeals, and asks us to enforce the Pelletier I mandate with respect to the Rule 11 sanctions; Pelletier and Schlanger cross-appeal and ask us not to enforce the mandate in any respect because Zweifel has "incurred" no litigation expenses in this matter.

II.

We have in this circuit a well-settled "mandate rule" obligating district courts to adhere closely to the dictates of our opinions. See Barber v. International Bhd. of Boilermakers, 841, F.2d 1067, 1070 (11th Cir. 1988); Litman v. Massachusetts Mut. Life Ins. Co., 825 F.2d 1506, 1511 (11th Cir. 1987) (en banc), cert. denied, 484 U.S. 1006, 108 S.Ct. 700 (1988); Piambino v. Bailey, 757 F.2d 1112,1119 (11th Cir. 1985), cert denied, 476 U.S. 1169, 106 S.Ct. 2889 (1986); Wheeler v. City of Pleasant Grove, 746 F.2d 1437, 1440 & n.2 (11th Cir. 1984); Westbrook v. Zant, 743 F.2d 764, 770 (11th Dir. 1984); Dorsey v. Continental Casualty Co., 730 F.2d 675, 678-79 (11th Cir. 1984); United States v. Williams, 728 F.2d 1402,1405-06 (11th Cir. 1984); Baumer v. United States, 685 F.2d 1318, 1321 (11th Cir. 1982).[4] This rule derives from the law of the case doctrine, see Litman, 825 F.2d at 1511; Piambino, 757 F.2d at 1120, and simply means that "a district court is not free to deviate from the appellate court's mandate." Barber, 841 F.2d at 1070 (quoting Wheeler, 746 F.2d at 1440 n.2). An issue decided by an appellate court must be followed in all subsequent proceedings "unless the presentation of new evidence or an intervening change in the controlling law dictates a different result, or the appellate decision is clearly erroneous

4. All circuits have this rule. See Litman, 825 F.2d at 1511.

and, if implemented, would work a manifest injustice." Piambino, 757 F.2d at 1120.

We have outlined a district court's limited role on remand. A district court

> may not alter, amend, or examine the mandate, or give any further relief or review, but must enter an order in strict compliance with the mandate. The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion, and the circumstances it embraces. Although the trial court is free to address, as a matter of first impression, those issues not disposed of on appeal, it is bound to follow the appellate court's holdings, both expressed and implied.

Id. at 1119 (citations omitted).

Zweifel contends that the district court erred by refusing to follow our mandate that Rule 11 sanctions be imposed against Pelletier and Schlanger for their conduct before the district court. We agree.

We neither intended nor imagined that the district court, whether at Pelletier's and Schlanger's urging or on its own initiative, would meticulously parse our opinion, as they have done, to determine the meaning of our mandate. The plain language of our opinion indicates that we considered all of Pelletier's claims to be utterly baseless and that we intended Pelletier and Schlanger to pay all of the attorney' fees, litigation expenses, and costs incurred to defend against those claims in the district court. See Pelletier I, 921 F.2d at 1511, 1515, 1522, 1523. At the very lease, the palpable "spirit of the mandate," Piambino, 757 F.2d at 1119, demands this result. The court's sole task on remand was to determine what the fees, expenses, and costs were. See id. at 1522-23. in refusing to carry out this task, and, in deciding instead to fine Pelletier $25,000, the court abused the limited discretion that our mandate left to it. See Barber, 841 F.2d at 1070-71 (prohib-

iting a district court from addressing the issues to be resolved on remand on a novel theory).

It is of no moment that Zweifel purchased insurance to cover the expense of defending claims such as those that Pelletier brought against him. Pelletier and Schlanger are not entitled to "free" violations of Rule 11 because of Zweifel's prudence in investing in insurance coverage. Nor is it of any moment that Zweifel's insurance carrier has not been made a party in this appeal. Pelletier's and Schlanger's argument that Zweifel cannot recover what he may have to pay over to the insurance company in satisfaction of its subrogation rights is patently frivolous.

In sum, because Pelletier and Schlanger do not dispute that Zweifel's defense in the district court cost $282,837.96 in attorney's fees, litigation expenses,a nd court costs, there is no reason for further consideration of this matter in the district court. All that remains is the entry of judgment. Accordingly, we direct the district court, upon receipt of our mandate, toenter judgment forthwith for Gary D. Zweifel against Ronald O. Pelletier and Herbert P. Schlanger, jointly and severally, in the amount of $301,156.46 plus interest from April 10, 1991, the date the Pelletier I mandate issued.[5]

IT IS SO ORDERED.

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5. We note that on March 26, 1992, the district court enetered judgment for Zweifel against Pelletier and Schlanger, jointly and severally, in the sum of $43,318.50. That amount if made up of the fine, $25,000, the district court imposed against Pelletier and Schlanger under Fed. Civ. P. 11 and the double costs and attorney's fees, $18,318.50, we directed the court to enter under Fed. R. App. P. 38. For the reasons stated in this opinion, that judgment, to the extent it included the fine, was erroneously entered. We therefore direct the district court to vacate that judgment, noting that the portion representing the Fed. R. App. P. 38 relief will be included in the judgment to be netered pursuant to this mandate.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RONALD O. PELLETIER	:	
	:	CIVIL NO.
vs.	:	1:86-CV-156-ODE
	:	
GARY D. ZWEIFEL	:	

ORDER

On March 18, 1993, The United States Court of Appeals for the Eleventh Circuit issued its mandate in the instant action. Pursuant ot direction form the Eleventh Circuit, this court's entry of judgment on March 26, 1992 for Gary D. Zweifel against Ronald O. Pelletier and Herbert P. Schlanger, jointly and severally, in the amount of $43,318.50 is VACATED. In further accordance with the Eleventh Circuit's mandate, the clerk is DIRECTED to enter judgment for Gary D. Zweifel against Ronald O. Pelletier and Herbert P. Schlanger, jointly and severally, in the amount of $301,156.46 plus interest from April 10, 1991.

SO ORDERED, this _22_ day of March, 1993.

__/s/_____
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8630

RONALD O. PELLETIER.

Plaintiff-Appellee
Cross-Appellant

versus

GARY D. ZWEIFEL,

Defendant-Appellant
Cross-Appellee

(Filed MAY 14 1993)

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING
AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Cheif Judge, ANDERSON, Circuit Judge, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

(✔) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regualr active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court havingbeen polled at the request of oneof the members of the Court and a majorit of theCircuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service nothaving voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

__/s/ Illegible
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
SEP 15 1993
OFFICE OF THE CLERK

No. 93-344

In The

Supreme Court of the United States

October Term, 1993

RONALD O. PELLETIER,

Petitioner,

v.

GARY D. ZWEIFEL,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Respondent respectfully objects to the Questions which Petitioner asserts are presented for review in this matter, and states, instead, the following:

1. Did the Court of Appeals properly exercise its authority in reversing the decision of the district court for failure to comply with its mandate when – after this Court had denied a Petition for Writ of Certiorari filed by Petitioner and his counsel to the opinion upon which the mandate was based – the district court failed to impose sanctions as directed by the Court of Appeals for the attorneys' fees, expenses of litigation, and court costs *incurred* by Respondent established by uncontested and undisputed evidence, basing such action upon its interpretation of the mandate to require that it impose sanctions measured only by fees and expenses *actually paid* by Respondent?

LIST OF INTERESTED PERSONS

The following is a complete list of persons and entities with an interest in the outcome of this litigation:

Trial Judge:	Hon. Orinda P. Evans United States District Judge
Petitioner:	Ronald O. Pelletier
Respondent:	Gary D. Zweifel
Respondent's Counsel:	Robert E. Hicks Robert A. Bartlett Hicks, Maloof & Campbell, A Professional Corporation
Other entities with an interest:	The Law firm of Lokey & Bowden
	General Accident Insurance Company of America, Inc. Insurer for Lokey & Bowden
	Shand, Morahan & Company, Inc. Managing Underwriter for General Accident Insurance Company of America, Inc.

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OPINIONS BELOW

Petitioner has included in the Appendix to his Petition (Petitioner's App.) copies of the Opinions entered by the district court and the Court of Appeals which are pertinent to this Petition.

JURISDICTION OF THIS COURT

Respondent acknowledges that this Court has jurisdiction to consider the Petition.

STATUTES AND RULE PROVISIONS INVOLVED

In addition to the provisions of the Federal Rules of Civil Procedure cited and quoted by Petitioner, Respondent respectfully advises the Court that the following statutes and rules are also involved in this matter, the text of which, in accordance with Rule 14.1(f) & (k) of this Court, are set forth in Respondent's Appendix hereto (Respondent's App.): 28 U.S.C. § 2106 (1948); Fed. R. App. P. 38; Fed. R. Civ. P. 12(b)(6), 43, and 78; and Local Rules 220-1, and 270-1, Rules of Practice for the United States District Court for the Northern District of Georgia.

STATEMENT OF THE CASE

A. Introduction.

This is the second time which Petitioner has sought to have this Court review the action of the Eleventh Circuit Court of Appeals (hereafter the "Court of Appeals") in this case. In his first attempt (Case No. 91-3), Petitioner, joined by his counsel,[1] sought to have this

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[1] Petitioner's counsel, Herbert P. Schlanger, filed a reorganization proceeding under Chapter 11 of the Bankruptcy Code after the Petition to this Court from *Pelletier I* was filed, but before this Court ruled thereon. Respondent and the other parties interested in this matter have reached a settlement with Mr. Schlanger, and he is no longer a party to these proceedings.

Court review the Court of Appeals opinion in *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir.) ("*Pelletier I*"), *reh'g denied*, 931 F.2d 901 (11th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 167 (1991). This Court denied that Petition by Order entered on or about October 7, 1991. *Id.*

The *Pelletier I* Court conducted an extensive *plenary* and *de novo* review of the record which had been amassed in the district court – consisting of two large boxes of exhibits and nine volumes of record on appeal. Based upon such review, the *Pelletier I* Court concluded that the district court had properly granted Respondent's motions to dismiss and for summary judgment, and that Petitioner, himself a lawyer, owner of a company conducting a bar review course, and sophisticated businessman, had, with his counsel, engaged in egregious conduct in violation of Fed. R. Civ. P. 11 ("Rule 11") in the district court, and Fed. R. App. P. 38 ("App. Rule 38") on appeal, by asserting baseless claims – in bad faith and vexatiously – against Respondent. The *Pelletier I* Court further determined that the egregious nature of such conduct warranted the imposition of sanctions against Petitioner and his counsel, jointly and severally, measured by the attorney's fees, expenses of litigation, and court costs incurred by Respondent in defending himself against their baseless claims in the district court, pursuing his motion for sanctions, and opposing Petitioner's appeal to the district court's grant of his motions to dismiss and for summary judgment.

The *Pelletier I* Court remanded the matter to the district court for a determination of the amount of those fees, expenses, and costs.

In his Petition for Writ of Certiorari to this Court from *Pelletier I*, Petitioner did not contest the determinations of the Court of Appeals as to Respondent's motions to dismiss and for summary judgment, or the imposition of sanctions under App. Rule 38.

The published version of *Pelletier I* runs for 58 pages, and the recitation of the *undisputed facts* contained in the

record upon which the *Pelletier I* Court determined Petitioner's claims to be baseless and pursued in bad faith consumes 25 of those pages. *Id.* 1470-95. Moreover, those facts are also interspersed throughout the remainder of the opinion as the *Pelletier I* Court analyzed Petitioner's claims, determined them to be baseless, and explained its conclusions as to Petitioner's violations of Rule 11 and App. Rule 38 and the nature of the sanctions warranted by such conduct.

In analyzing these claims, the *Pelletier I* Court was required to sift through many subsidiary facts to ascertain that the conclusory allegations stated in Petitioner's complaint had no factual predicate, and that because of his intimate involvement in the transactions in which the claims asserted against Respondent purportedly arose, Petitioner knew his claims had no merit when he brought the complaint. A detailed examination of these subsidiary facts also revealed to the *Pelletier I* Court that Petitioner brought the complaint and pursued this action in bad faith, and for the purpose of harassing Respondent, with the hope and expectation that he would force Respondent to a quick settlement in an attempt to buy back his good name.[2]

Throughout the history of this case, the various courts which have addressed this controversy have been confronted with many impertinent and immaterial allegations from Petitioner which are irrelevant to the legal issues involved, unsupported by the record, waste valuable judicial resources, and have caused Respondent to incur fees and costs to refute. Notwithstanding that Petitioner did not initially challenge the correctness of the

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[2] A good name, of course, cannot be bought or sold. Who steals my purse steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name robs me of that which not enriches him, and makes me poor indeed.

Shakespeare: *Othello*, Act III, scene iii, l. 151

rulings of the *Pelletier I* Court that all his claims lacked merit either because they failed to state claims or that there were no facts to support them, Petitioner continues to assert these baseless and irrelevant allegations in his second Petition before this Court. Respondent objects to, and refutes, the allegations regarding the history of this matter which are inconsistent with the facts as determined from the record by the *Pelletier I* Court, and, instead, respectfully refers this Court to the recitation of pertinent facts in *Pelletier I* derived from the Court's *plenary* and *de novo* review of the *entire* record and the Court's observations of Petitioner's conduct on appeal.

B. Course of Proceedings and Dispositions Below.

The latest chapter in this saga began with the remand of this case from the Court of Appeals to the district court in accordance with its opinion in *Pelletier I* that the claims brought against Respondent by Petitioner were frivolous when brought, became even more so as discovery proceeded, and were intentionally brought and pursued in bad faith – 921 F.2d at 1515; and its determination that monetary sanctions pursuant to Rule 11 were appropriate and should be imposed jointly and severally against Petitioner and his counsel – 921 F.2d at 1522.

Based upon its determinations, the *Pelletier I* Court remanded the case to the district court, providing the following direction:

> With respect to the amount of the sanction, we direct the district court, upon receipt of our mandate, to award [Respondent] a sum of money that will compensate him for the attorneys' fees, litigation expenses, and costs he incurred in defending this lawsuit in the district court and in prosecuting his motion for Rule 11 sanctions. Such award shall take into account any fees, expenses, and costs [Respondent] may incur, on remand, in obtaining the award.

Id. The *Pelletier I* Court also determined that the appeal pursued by Petitioner from the district court's order

granting Respondent's motion for summary judgment was frivolous under App. Rule 38, and that Respondent was entitled to an award of fees under App. Rule 38, stating:

> We do not hesitate one whit in awarding [Respondent] double costs and a reasonable attorney's fee for opposing [Petitioner's] appeal. *See* Fed. R. App. P. 38 advisory committee note. On remand, the district court shall determine the amount of that fee and give [Respondent] judgment for the full amount thereof against [Petitioner] and [his counsel], jointly and severally.

921 F.2d at 1523.[3]

On or about April 10, 1991, after denying the motion for rehearing filed by Petitioner to that portion of *Pelletier I* pertaining to sanctions, the *Pelletier I* Court issued its mandate to the district court,[4] and on or about April 17, 1991, the district court entered an order making the mandate of the *Pelletier I* Court the judgment of the District Court.

On or about May 15, 1991, Respondent filed his amended motion for sanctions based upon *Pelletier I*, which, supported by affidavits and accompanying materials, established that as of that time, Respondent had incurred attorneys' fees, costs, and expenses in the total amount of $286,136.46. Respondent asked the District Court, in pertinent part, to enter an Order imposing sanctions upon Petitioner in the amount stated, together with such additional amounts as might be further

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[3] The *Pelletier I* Court specifically stated: "In assessing the attorney's fee, the district court shall not compensate [Respondent] for his attorney's services in prosecuting his appeal from the district court's order denying Rule 11 sanctions." *Id.* n.104.

[4] Notwithstanding the accompanying instructions as to the procedures for obtaining a stay of the mandate pending the filing of a Petition for Writ of Certiorari with this Court, Petitioner and his counsel did not seek such a stay.

incurred by Respondent in obtaining such Order, and entering a monetary judgment against Petitioner and in favor of Respondent in that amount.

On or about June 24, 1991, Petitioner filed his response to Respondent's motion for sanctions asserting that Respondent was entitled to no award of sanctions because Respondent's legal fees and expenses were actually paid by the insurance company for the law partnership of which he was a member, Lokey & Bowden, and, therefore, no fees or expenses were "incurred" by Respondent.

On or about July 9, 1991, the district court conducted a hearing on Respondent's amended motion for sanctions. During the course of that hearing, Petitioner, through his counsel, conceded that the hourly rates submitted by Respondent's counsel, and the hours expended by them in his defense, were reasonable, and also conceded the same as to the hourly rates and hours of Respondent's counsel in opposing Petitioner's appeal from the district court's grant of Respondent's motions to dismiss and for summary judgment. Petitioner also did not contest the reasonableness of the additional hours expended from and after the date of Respondent's amended motion for sanctions up to the date of said hearing, or the rates applicable thereto – the dollar value of which was $15,020.00. Instead, Petitioner reiterated his argument that since Respondent had not personally "paid" any of the attorneys' fees or expenses incurred in his defense, Respondent was not entitled to an award of those fees under the express language of *Pelletier I*.

On or about July 27, 1991, Petitioner and his counsel filed their Petition for Writ of Certiorari to this Court with respect to *Pelletier I*, and on or about October 7, 1991 this Court denied the Petition for Writ of Certiorari of Petitioner and his counsel.

On or about March 26, 1992, the district court entered an Order partially granting Respondent's amended motion for sanctions – awarding a total of $43,318.50,

jointly and severally, against Petitioner and his counsel. [Petitioner's App. 18 through 23].

In this Order, the district court acknowledged that the undisputed evidence established that the attorneys' fees, litigation expenses, and costs "necessitated by the filing of this action and the prosecution of his motion for Rule 11 sanctions amount to $282,837.96 ($267,817.96 requested in amended motion for sanctions + $15,020.00 requested in Supplemental Statement)." [Petitioner's App. 21]. The district court also acknowledged that Petitioner had offered no objection to the hourly rates requested by Respondent's counsel or the reasonableness of the hours expended, and that, in fact, Petitioner had expressly conceded that neither the hourly rate nor the hours expended were excessive. [Petitioner's App. 21].

Notwithstanding these findings, the district court interpreted *Pelletier I* to mean that the sanctions against Petitioner were to be measured only by those "actual fees which [Respondent] has paid or for which he is liable." [Petitioner's App. 21-22]. Considering the evidence that Respondent's fees were paid either by his law firm or the insurance purchased by that law firm, the district court concluded that Respondent had incurred no fees or expenses. [Petitioner's App. 22]. Nevertheless, the district court, being "mindful of . . . its obligation to implement the spirit of the Court of Appeals' directive" [Petitioner's App. 21], awarded Respondent $25,000 in sanctions against Petitioner and his counsel for their Rule 11 violations. [Petitioner's App. 23].

The district court further awarded Respondent $18,318.50 in sanctions against Petitioner and his counsel for their App. Rule 38 violations – the amount requested by Respondent – observing that Petitioner and his counsel had "not in any way contested the reasonableness of the amount of Rule 38 sanctions sought by [Respondent]." [Petitioner's App. 20].

Thereafter, Respondent and Petitioner filed timely notices of appeal to the Court of Appeals as to the district court's Order and Judgment of March 26, 1992, as well as

its later Order denying Petitioner's motion to alter or amend said judgment.

On or about March 18, 1993, the Court of Appeals issued its *per curiam* opinion reversing the March 26, 1992 Order and Judgment of the district court. *Pelletier v. Zweifel*, 987 F.2d 716 (11th Cir. 1993) ("*Pelletier II*"). In explaining its opinion in *Pelletier I*, the Court of Appeals stated, in pertinent part:

> We reversed . . . the district court's decision denying [Respondent] relief under Fed. R. Civ. P. 11, concluding that monetary sanctions were in order. *Id.* at 1521-23. We did so because [Petitioner's] claims against [Respondent] were utterly baseless. We explained that "all of the claims [Petitioner] made clearly fall below the standard of reasonableness required by Rule 11. While these claims were frivolous when made, they became even more so as discovery proceeded and it became apparent that [Petitioner's] own evidence contradicted his factual allegations. . . . " *Id.* We concluded that "[Petitioner's] complaint had no reasonable factual basis when pled and that [Petitioner] and [his counsel] knew this. When they decided to pursue this action despite their knowledge that it was frivolous, they acted in bad faith. . . . " *Id.* at 1515.
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> . . .
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> Because [Petitioner's] appeal was also patently frivolous, we awarded [Respondent], under Fed. R. App. P. 38, "double costs and a reasonable attorney's fee for opposing [Petitioner's] appeal." *Id.* at 1523.

987 F.2d at 716-17; Petitioner's App. 25-26.

With regard to the proceedings in the district court to determine the amount of Respondent's reasonable attorneys' fees, expenses, and costs, the *Pelletier II* Court observed:

> At the hearing convened to implement *Pelletier I*'s mandate, [Respondent] established that he

> incurred $282,837.96 in attorney's fees, litigation expenses, and costs in defending the case in the district court, and $18,318.50 on appeal. [Petitioner] and [his counsel] did not challenge the reasonableness of these amounts. Instead, they argued that [Respondent] was entitled to recover nothing because he had "incurred" no litigation expenses at all; rather, his insurance company had incurred and paid the expenses.

987 F.2d at 717; Petitioner's App. 26.

In reversing the determination of the district court, the *Pelletier II* Court, citing numerous prior decisions, concluded that the district court had misinterpreted its prior mandate and failed to carry out both its letter and its spirit, stating, in pertinent part:

> We have in this circuit a well-settled "mandate rule" obligating district courts to adhere closely to the dictates of our opinions. [cites omitted]. This rule derives from the law of the case doctrine, [cite omitted], and simply means that "a district court is not free to deviate from the appellate court's mandate." [cites omitted].
>
> . . .
>
> We neither intended nor imagined that the district court, whether at [Petitioner's] and [his counsel's] urging or on its own initiative, would meticulously parse our opinion, as they have done, to determine the meaning of our mandate. The plain language of our opinion indicates that we considered all of [Petitioner's] claims to be utterly baseless and that we intended [Petitioner] and [his counsel] to pay all of the attorney's fees, litigation expenses, and costs incurred to defend against those claims in the district court. *See Pelletier I*, 921 F.2d at 1522-23. At the very least, the palpable "spirit of the mandate," [cite omitted], demands this result. The court's sole task on remand was to determine what the fees, expenses, and costs were. *See Id.* 921 F.2d at 1522-23. In refusing to carry out this task, and, in deciding instead to fine

> [Petitioner] $25,000, the court abused the limited discretion that our mandate left to it. [cite omitted].

987 F.2d at 718 (citations, except to *Pelletier I*, omitted); Petitioner's App. 27-29.

The *Pelletier II* Court rejected the argument of Petitioner, and the determination of the district court, that because Respondent and his law firm had the foresight to purchase insurance which covered the cost of his defense, Petitioner could not be liable in sanctions for the attorney's fees, litigation expenses, and costs incurred in Respondent's defense. 987 F.2d at 718; Petitioner's App. 29.[5]

The *Pelletier II* Court concluded that because Petitioner and his counsel did not dispute Respondent's defense costs, there was nothing further for the district court to do in this matter but enter judgment in the amount established by Respondent ($301,156.46), together with interest from April 10, 1991 [the date of the mandate in *Pelletier I*], and directed the district court to do so upon receipt of its mandate. 987 F.2d at 719; Petitioner's App. 29.

On or about March 23, 1993, the district court, in accordance with the mandate of the *Pelletier II* Court, entered such judgment against Petitioner and his counsel, jointly and severally.

On or about March 23, 1993, Petitioner filed his Petition for Rehearing or Rehearing En Banc in the Court of Appeals, and on or about May 14, 1993, the Court of Appeals denied that Petition.

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[5] As explained to the Court of Appeals, Respondent and Lokey & Bowden have reached an agreement with the insurance carrier to distribute any amounts recovered as sanctions on a pro-rata basis, calculated by comparing the amount of deductible and non-recompensed attorneys' fees and expenses paid by Lokey & Bowden to the total fees and expenses paid by the insurance company.

On or about August 12, 1993, Petitioner served his Petition for Writ of Certiorari to this Court upon Respondent, and Respondent received said Petition on August 16, 1993.

C. Statement of Facts.

Given the procedural posture of this case – where the merits have been previously adjudicated and the determination of the Court of Appeals to which this Petition is directed involved only the quantification of the sanctions to be imposed against Petitioner and his counsel – Respondent submits that substantially all the facts necessary to decide this matter have been recited above.

Considering, however, that notwithstanding this Court's prior denial of his Petition for Writ of Certiorari from *Pelletier I*, Petitioner seeks to revisit the determinations of *Pelletier I*, Respondent believes that a succinct restatement of facts which supported the *Pelletier I* Court's determinations is in order.

As recited above, the *Pelletier I* Court concluded that Petitioner's complaint had no reasonable factual basis when pled, that Petitioner knew this, and that when he decided to pursue this action despite his knowledge that it was frivolous, he acted in bad faith. *See* 921 F.2d at 1515. In applying the objective standards for determining reasonableness under Rule 11,[6] and construing the evidence most favorably to Petitioner,[7] the Court stressed

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[6] *See*, for example, *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (*en banc*); *Thomas v. Evans*, 880 F.2d 1235, 1243 (11th Cir. 1989); *Adamson v. Brown*, 855 F.2d 668, 673 (10th Cir. 1988); *White v. General Motors Corp.*, 908 F.2d 675, 680 (10th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991); and *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830-31 (9th Cir. 1986).

[7] *See*, for example, *Pelletier I*, 921 F.2d at 1497 n.7, where the Court of Appeals states: "Again for the sake of showing that Rule 11 sanctions are justified, we make these assumptions in [Petitioner's] favor."

the following facts, among others, in support of its conclusions:

– Petitioner was a lawyer skilled in the law; had been a member of the Georgia bar for nearly 10 years at the time the suit was brought; and had established a Georgia bar review course. *Id.* at 1515, 1519-20.

– Petitioner's claim that he relied on the purported promise of the president and major shareholder of the company represented by Respondent to turn over control of that company to Petitioner, and that he was defrauded by the president's alleged refusal to do so (with Respondent's purported conspiratorial assistance) "borders on the preposterous." Rather, the undisputed facts established that Petitioner expected the president to renege, and took several steps to protect himself, including: keeping his deal with the other shareholders to purchase their company stock secret from the president and Respondent; making a secret side agreement with those shareholders to control their litigation against the president and their votes as directors of the company (thereby putting himself in a position to get the president to act by his own misstatements); beginning a campaign to harass the president into submission by causing the company to go into default with its lenders, and by commencing litigation; and hiring his counsel to secretly represent Petitioner's interests while pretending to represent the other shareholders. *Id.* at 1515, 1474-79.

– Petitioner knew, well before he brought his complaint, that Respondent had not defrauded Petitioner, but, rather, had, *under the view of the evidence most favorable to Petitioner*, merely advised a client not to sign an agreement that was one-sided and had no consideration flowing to that client. *Id.* at 1516, 1474-76.

– Each count of Petitioner's original complaint was objectively frivolous when filed. *Id.* at 1517 n.91, 1495-1513.

– Petitioner was warned by the district court within several weeks after the filing of the original complaint

that he and his counsel "were treading on mighty dangerous grounds" and should acquaint themselves with Rule 11, and that the pivotal allegations of the complaint constituted nothing more than conclusions that would have to be repled. *Id.* at 1492, 1518, 1520.

– Instead of abandoning his claims, Petitioner and his counsel repled the complaint, and in doing so engaged in the same sort of "shot-gun" approach used in the original complaint, "replete with factual allegations that could not be possibly material to any of the causes of action they assert." The differences between the two complaints consisted, essentially of the expansion of the numbered paragraphs from 141 to 241, and four volumes of exhibits were attached to the amended complaint (making the document over five inches thick). The *Pelletier I* Court expressly noted that it undertook the task of deciphering the amended complaint by referring to the four volumes of exhibits, and found that none of the claims had merit. *Id.* at 1517-19.

– In addition to the admonition from the district court, an independent special counsel appointed by the bankruptcy court in the company's bankruptcy case to examine into claims which Petitioner sought to have assigned to him, and which were substantially identical to those being pursued in this case, concluded that the possibility of litigation sanctions against the bankruptcy estate, including Rule 11 sanctions, were sufficiently great not to allow the undertaking of such claims, and the bankruptcy court concurred in such report after a hearing attended by Petitioner – yet instead of abandoning his claims, Petitioner continued to press them. *Id.* at 1493-94, 1516.

– Petitioner failed to call to the attention of the *Pelletier I* Court the ruling in the Georgia Court of Appeals that Petitioner never became a stockholder of the company. This failure to disclose was also cited by the *Pelletier I* Court as a ground for imposing sanctions against Petitioner and his counsel under App. Rule 38 [an

action about which Petitioner did not complain in his first Petition]. *Id.* at 1510-11, 1521, 1523.

Based upon these and other actions of Petitioner – who was himself a participant in the transactions in which he falsely claimed that Respondent had committed serious acts of criminal misconduct – the *Pelletier I* Court concluded that Petitioner's claims had no basis in fact, and that they were brought in bad faith, vexatiously, and for the improper purpose of harassing Respondent to extract a settlement from him. *Id.* at 1515, 1517.

REASONS FOR DISALLOWANCE OF THE WRIT

A. The *Pelletier I* Court Properly Concluded that Petitioner had Committed Egregious Violations of Rule 11 and App. Rule 38, and Properly Determined the Nature of the Sanctions to be Imposed Upon Petitioner for Those Violations – Remanding The Matter to the District Court for a Determination of the Amount of Those Sanctions.

The essence of Petitioner's argument is that the *Pelletier I* Court should not have determined the nature of the sanctions to be imposed, but, rather, should have remanded the matter to the district court to give that court another opportunity to take evidence of "mitigating circumstances" that could, according to Petitioner, have some impact upon the amount of the sanctions to be imposed against him. In support of this argument, Petitioner cites to several cases which he contends support his position. In making this argument, however, Petitioner glosses over several factors which establish that this case is not in conflict with the cases cited by him, and that based upon the specific factual context of this case, those cases are distinguishable.

The *Pelletier I* Court reviewed Petitioner's appeal from the district court's grant of summary judgment for Respondent using a standard of review which was *plenary* and *de novo*, employing the same legal standard as used

in the district court – whether Respondent was entitled to judgment as a matter of law based upon the material facts as to which there was no genuine dispute. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986); *Mercantile Bank & Trust v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985); *Carlin Communication v. Southern Bell*, 802 F.2d 1352 (11th Cir. 1986).

The *Pelletier I* Court conducted a similar *plenary* and *de novo* review of the district court's dismissal of certain of Petitioner's claims under Fed. R. Civ. P. 12(b)(6), again employing the same legal standard as used by the district court – whether it appeared beyond doubt that Plaintiff could prove no set of facts in support of his claims that would entitle him to relief. *Harris v. Kerner*, 404 U.S. 519, 520-21 (1972); *Wright v. Newsome*, 795 F.2d 964 (11th Cir. 1986). Since discovery had been completed, and a substantial factual record had been developed which contained the purported factual predicate for Petitioner's claims, the legal standard for the review of the district court's grant of summary judgment was also applicable to these claims. *Celotex*, 477 U.S. at 322-25; *Ross v. Bank South*, 837 F.2d 980, 998-99 (11th Cir. 1988).

Using these standards in conducting a thorough and sifting review of the *entire* record, after reading Petitioner's complaint "in the light most favorable to him, with respect to the claims dismissed under Fed. R. Civ. P. 12(b)(6), and giving him the benefit of every reasonable inference, with respect to the claims disposed of on summary judgment under Fed. R. Civ. P. 56," 921 F.2d at 1470, the *Pelletier I* Court affirmed the district court's grant of Respondent's motions to dismiss and for summary judgment, and concluded that Petitioner's claims had no merit.

Having failed to challenge this determination by the *Pelletier I* Court in his earlier Petition for Writ of Certiorari, Petitioner now asserts that the district court's initial grant of summary judgment to Respondent, and the *Pelletier I* Court's affirmance of the district court's grant were erroneous. Respondent, respectfully referring

this Court to the extraordinarily detailed analysis of the record necessitated by Petitioner's appeal from the district court's grant, submits that under the criteria for weighing the sufficiency of the undisputed evidence in connection with a motion for summary judgment as espoused by this Court in *Celotex*, 477 U.S. at 322-25, Petitioner's belated assertion has no merit.[8]

In considering Respondent's cross-appeal from the district court's denial of his motions for sanctions, the *Pelletier I* Court, citing this Court's opinion in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), acknowledged that it should apply an abuse of discretion standard in reviewing all aspects of the district court's Rule 11 determinations, and that it could reverse the district court only if it found that the district court had abused its discretion. *Id.* at 1514.

In *Cooter & Gell*, this Court observed that the issues involved in determining whether Rule 11 has been violated involve "fact-intensive close calls," and if a Court of Appeals, using a deferential standard, concluded that a district court had relied upon a materially incorrect view of the law or had based its findings on an erroneous view of the law, then the Court of Appeals would be justified in setting aside the district court's ruling. 496 U.S. at 402.[9]

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[8] Moreover, considering that Petitioner did not raise these grounds of objection to *Pelletier I* in his first Petition, if this Court had granted that Petition, under a long line of authority, it is unlikely that this Court would have considered them. *See, for example, F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 121 n6 (1974); *Taylor v. Freeland & Kronz*, ___ U.S. ___, 112 S. Ct. 1644, 118 L. Ed. 2d 280, 288-89 (1992). This Court should not entertain Petitioner's belated effort to raise them now.

[9] In emphasizing the benefit of this deferential rule, this Court stressed that giving the district court the discretion to resolve questions involving "multifarious, fleeting, special, narrow facts that utterly resist generalization" in the Rule 11 context would "streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and

The *Pelletier I* Court, using the deferential standard set forth in *Cooter & Gell*, and having the *entire record* of this case before it, determined that the district court had abused its discretion in failing to conclude that Petitioner's conduct violated Rule 11, because it based its ruling on an erroneous view of the law and on a clearly erroneous view of the evidence. *Id.* at 1514. In so concluding, the *Pelletier I* Court observed that the district court had failed to conduct a searching inquiry into the merits of Petitioner's complaint, and as a result of such failure, the district court developed a clearly erroneous view of the evidence. *Id.*, *Cooter & Gell*, 496 U.S. at 402.

None of the matters decided by the district court which were reviewed by the *Pelletier I* Court required the determination of credibility or the weighing of the sufficiency of evidence; and the issues before the *Pelletier I* Court, and the record upon which those issues were based, were identical to what had been before the district court. Indeed, the *Pelletier I* Court was in an even better position than the district court in assessing Respondent's motion for sanctions, since the district court, out of procedural necessity, had to take up piece-meal and *seriatim* the various motions in this case which were, instead, presented to the *Pelletier I* Court in consolidated fashion.

. Using the comprehensive knowledge which it had gained from its own *plenary* and *de novo* review of the entire record of this case, the *Pelletier I* Court concluded that Petitioner's complaint had no reasonable factual

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reconsidering facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation." 496 U.S. at 404.

Unfortunately, in this case the pursuit by Petitioner of his appeal from the district court's grant of Respondent's motions to dismiss and for summary judgment multiplied, rather than reduced, the underlying litigation; and the failure of the district court to apply the proper discretionary standards to Petitioner's conduct, has spawned, rather than reduced, satellite litigation.

basis when pled, that Petitioner knew this, and that when he decided to pursue this action despite his knowledge that it was frivolous, he acted in bad faith. *Id.* at 1515. Respondent respectfully submits that based upon the undisputed material facts which were in the *Pelletier I* Court, and applying the deferential standard for review of the district court prescribed by *Cooter & Gell*, 496 U.S. at 402, the Court of Appeals correctly decided these matters. The *Pelletier I* Court was perfectly capable of determining not only that the district court should have imposed sanctions upon the Petitioner, but also the appropriate form that those sanctions should take – the attorneys' fees, expenses of litigation, and costs incurred by Respondent resulting from the bad faith pursuit of Petitioner's baseless claims.

The cases cited by Petitioner in support of his argument that the Court of Appeals should not have determined the nature of the sanction appropriate for his conduct in this case, or that the Court of Appeals should have remanded the case to the district court to allow further evidence in "mitigation" of this sanction, do not refute the use of monetary sanctions for deterrence; indeed, those cases support such use. *See, for example, Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 193 (3d Cir. 1988); *In re Kunstler*, 914 F.2d 515, 522-23 (4th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1607 (1991); *Stewart v. American Intern. Oil & Gas Co.*, 845 F.2d 196, 201-02 (9th Cir. 1986); *In re Yagman*, 796 F.2d 1165, 1184-85, *amended* 803 F.2d 1085 (9th Cir. 1986), *cert. denied*, 484 U.S. 963 (1987); *White v. General Motors Corp.*, 908 F.2d at 683-84.

Indeed, in cases such as this, involving frivolous allegations of criminal misconduct under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), sanctions measured by the attorneys fees and costs incurred by the defendants have been upheld by those Courts of Appeal considering the matter. *See for example Avirgan v. Hull*, 932 F.2d 1572, 1581-83 (11th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 913,

and *cert. denied*, ___ U.S. ___, 113 S. Ct. 405 (1992) (sanctions for bad faith filing and prosecution of RICO case awarded in the amount of $1,034,381.36 for defendants attorneys' fees and costs of litigation); *Brandt v. Schal Assocs., Inc.*, 960 F.2d 640 (7th Cir. 1992) (sanctions for bad faith filing and prosecution of RICO case awarded in the amount of $443,564.66 for defendants attorneys' fees and costs of litigation).

Moreover, it is clear that if the circumstances warrant, monetary sanctions measured by the attorney's fees and litigation expenses incurred by the opposing party are appropriate sanctions under Rule 11. *Donaldson v. Clark*, 819 F.2d 1551, 1556-58 (11th Cir. 1987) (en banc); *Cooter & Gell*, 496 U.S. at 393. *See also Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978), applying this concept to an award of attorney's fees in Title VII cases; *Chambers v. NASCO*, ___ U.S. ___, 111 S. Ct. 2123, 2139, *reh'g denied*, ___ U.S. ___, 112 S. Ct. 12 (1991), applying this concept to an award of attorney's fees made under a federal court's inherent powers.

In *Pelletier I*, the Court devoted approximately 19 printed pages to its analysis of the Rule 11 issues. 921 F.2d 1513-22. Based upon its *plenary* and *de novo* review of the record, the *Pelletier I* Court concluded that:

> . . . [Petitioner's complaint had no reasonable factual basis when pled and that [Petitioner] and [his counsel] knew this. When they decided to pursue this action despite their knowledge that it was frivolous, they acted in bad faith; they simply demanded from [Respondent] the redress they had sought and failed to obtain from [the company's president] on similar meritless claims.

Id. at 1515. As to the particular culpability of Petitioner for sanctions, the *Pelletier I* Court stated:

> In deciding whether [Petitioner] has prosecuted this case in bad faith, we have rejected the thought that his two complaints, and his briefs to us, might be the product of incompetent lawyering, and thus excusable, rather than the tools

> of harassment. We have done so because [Petitioner] is skilled in the law, and, moreover, had been warned (through [his counsel]) by a bankruptcy judge and a United States district judge that if he continued to pursue [Respondent], and his law firm, he was likely to run afoul of Rule 11.

Id. at 1519-20. After making additional observations regarding Petitioner's specific conduct, the *Pelletier I* Court concluded:

> Monetary sanctions plainly are warranted in this case. All of the claims [Petitioner] made clearly fall below the standard of reasonableness required by Rule 11. While these claims were frivolous when made, they became even more so as discovery proceeded and it became apparent that [Petitioner's] own evidence contradicted his own factual allegations.
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> . . .
>
> We think that imposing sanctions in this case would serve the dual purpose of deterring the filing of frivolous claims and defenses while not chilling attorneys' legitimate enthusiasm and creativity in advancing legal and factual theories. At a time when the federal courts – which are a scarce dispute resolution resource, indeed – are straining under the pressure of an ever-increasing caseload, we simply cannot tolerate this type of litigation. Particularly with regard to civil RICO claims, plaintiffs must *stop and think* before filing them. If used correctly, the civil RICO provisions may have many salutary effects. When used improperly, as in this case, those provisions allow a complainant to shake down his opponent, and, given the expense of defending a RICO charge, to extort a settlement. Such improper use of the civil RICO provisions comes at the expense of the federal judiciary and those who need ready access to the courts.

Id. at 1521-22. It was in this context that the *Pelletier I* Court observed:

> We need not remand the Rule 11 issues to the district court for further consideration under a proper application of the law. The record before us demonstrates beyond any question that Rule 11 sanctions are in order, what the sanctions should be as a minimum, and that [Petitioner] and [his counsel] should be liable for them jointly and severally.

Id. at 1514 n.87. As this Court observed in *Hutto v. Finney*, 437 U.S. 678 (1978), an award of attorneys' fees based upon bad faith litigation tactics "vindicates judicial authority without resort to more drastic sanctions available for contempt of court and makes the prevailing party whole for expenses caused by his opponent's obstinacy." *Id.* at 688 n.14. *See also Brandt v. Schal Assocs. Inc.*, 960 F.2d at 646 ("[D]eterence may well include the payment of expenses and attorneys' fees generated as a result of the filing of abusive litigation.").

28 U.S.C. § 2106, provides, in pertinent part, that this Court and the Court of Appeals have the power to reverse any judgment or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate order or judgment or require such further proceedings as may be just under the circumstances. This authority has been interpreted by this Court and the Court of Appeals to include the power, in a case before an appellate court on undisputed facts where the appellate court is in the same position as would be the court below, to resolve an issue which was not decided below due to the lower court's erroneous determination of a preliminary issue, and to dispense with the need for further evidentiary hearings if no legitimate purpose would be served thereby. *See, for example, Hormel v. Helvering*, 312 U.S. 552, 556-57 (1940); *Perkins v. Matthews*, 400 U.S. 379, 386 (1971); *Moses H. Cone Hosp. v. Mercury Constr.*, 460 U.S. 1, 29 (1983); *Forman v. United States*, 361 U.S. 416, 425, *reh'g denied*, 362 U.S. 937 (1960), *overruled on other grounds, Burks v. United States*, 437 U.S. 1 (1978); *Steinfeld v. Zeckendorf*, 239 U.S.

29, 30 (1915); *Joshi v. Florida State Univ. Health Ctr.*, 763 F.2d 1227, 1236 (11th Cir. 1985); *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347, 1351 (11th Cir. 1990).

Considering the egregious facts and circumstances of Petitioner's Rule 11 violations as determined by the Court of Appeals from its review of the *undisputed material facts* of record, the *Pelletier I* Court was authorized to determine that the appropriate sanction to be imposed upon Petitioner was to reimburse Respondent for the attorney's fees, expenses of litigation, and court costs incurred by him in his defense in the district court and in the pursuit of his motion for sanctions.

In challenging the *Pelletier I* Court's determinations regarding sanctions, Petitioner also glosses over the fact that when this matter was initially before the district court on Respondent's motion for sanctions, Petitioner failed to submit any evidence in mitigation, as required by applicable procedural rules.[10] If the district court had

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[10] Under Local Rules 270-1 and 220-1 of the United States District Court for the Northern District of Georgia, which are reprinted in the Appendix hereto, a party against whom a motion seeking attorney's fees has been filed must respond in writing within ten (10) days after the service of that motion, and failure to file a response indicates that there is no opposition to the motion. Local Rule 270-1 on the determination of attorney's fees refers to and incorporates the applicable provisions of Fed. R. Civ. P. 43(e), and Fed. R. Civ. P. 78, and reading these various rules in *pari materia* establishes that a party against whom attorney's fees are sought must present evidence in opposition thereto in the form of affidavits or live testimony, depending upon how the court considers the matter. The district court considered Respondent's motion for sanctions on the written submissions of the parties, which included affidavits submitted by Respondent to establish the reasonableness of the attorney's fees incurred in his defense, and a brief from Petitioner which did not address the "mitigating circumstances" he now claims an entitlement to present. Petitioner's brief was previously submitted to this Court as a part of Respondent's opposition to Petitioner's first Petition for Writ of Certiorari.

ruled, in the first instance, in the manner which the *Pelletier I* Court concluded was required by the undisputed evidence of record, then Petitioner, having had both the opportunity and the obligation to present such matters to the district court, surely would not have been heard to complain that he did not have his day in court. Since the *Pelletier I* Court merely performed the function which the district court should have performed, but failed to, using the same record and the same *undisputed material facts* which were available to the district court, including Petitioner's response to Respondent's motion for sanctions, Petitioner was not deprived of an opportunity to present matters to the district court, he merely failed to present any such matters.

Moreover, when this matter was before the district court on remand, it was only Petitioner's counsel, who, on his own behalf, sought to have the district court consider evidence of his changed financial circumstances resulting from his own Chapter 11 reorganization petition. Neither Petitioner's counsel, nor Petitioner on his own behalf, sought to have the district court consider evidence of Petitioner's financial circumstances. *See*, Plaintiff's Counsel's Motion for an Evidentiary Hearing and for a Re-Determination of the Appropriate Sanction to be Imposed Pursuant to Rule 11, and Memorandum in Support Thereof, which are reprinted in the Appendix hereto.

Respondent respectfully submits that under the fact specific circumstances of this case, the Court of Appeals had the authority to weigh and consider the *undisputed material facts* before it in connection with its *plenary* and *de novo* review on related matters in determining the proper sanction, rather than sending the case back to the district court for yet another round of "satellite litigation."

B. The Court of Appeals Properly Reversed the District Court Decision Which Failed to Impose Sanctions as Directed by the Mandate of *Pelletier I*.

In challenging the determinations of *Pelletier II*, Petitioner argues that it was erroneous for the same panel which decided *Pelletier I* to consider whether the district court properly interpreted its mandate.

The *Pelletier II* Court, citing several earlier opinions of the Eleventh Circuit Court of Appeals, based its decision to reverse the district court on the "well-settled 'mandate rule' obligating district courts to adhere closely to the dictates of our opinions." 987 F.2d at 718.[11] The *Pelletier II* court also observed that all circuits have a similar rule. *Id.*[12]

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[11] *See Baumer v. United States*, 685 F.2d 1318, 1321 (11th Cir. 1982); *United States v. Williams*, 728 F.2d 1402, 1405-6 (11th Cir. 1984); *Dorsey v. Continental Casualty Co.*, 730 F.2d 675, 678-79 (11th Cir. 1984); *Westbrook v. Zant*, 743 F.2d 764, 770 (11th Cir. 1984); *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 & n.2 (11th Cir. 1984); *Piambino v. Bailey*, 757 F.2d 1112, 1119 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Litman v. Massachusetts Mut. Life Ins. Co.*, 825 F.2d 1506, 1511 (11th Cir. 1987) (en banc), *cert. denied*, 484 U.S. 1006 (1988); *Barber v. International Bhd. of Boilermakers*, 841 F.2d 1067, 1070 (11th Cir. 1988).

[12] *See, for example, United States v. Iriarte*, 166 F.2d 800 (1st Cir.), *cert. denied*, 335 U.S. 816 (1948); *Crane Co. v. American Standard, Inc.*, 490 F.2d 332 (2d Cir. 1973); *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943 (3d Cir. 1985); *Stamper v. Baskerville*, 724 F.2d 1106 (4th Cir. 1984); *Todd Shipyards Corp. v. Auto Transp., S.A.*, 763 F.2d 745 (5th Cir. 1985); *In re United States Steel Corp.*, 479 F.2d 489 (6th Cir.), *cert. denied*, 414 U.S. 859 (1973); *Devines v. Maier*, 728 F.2d 876 (7th Cir.), *cert. denied*, 469 U.S. 836 (1984); *Poletti v. Commissioner*, 351 F.2d 345 (8th Cir. 1965); *In re Beverly Hills Bancorp.*, 752 F.2d 1334 (9th Cir. 1984); *Cherokee Nation v. Oklahoma*, 461 F.2d 674 (10th Cir.), *cert. denied*, 409 U.S. 1039 (1972); *City of Cleveland v. Federal Power Comm'n*, 561 F.2d 344 (D.C. Cir. 1977).

This Court, as well, has long recognized the "mandate rule" in cases before it. *See, for example, In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895), in which this Court stated its rule as follows:

> When a case has been once declared by this court on appeal and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. [cite omitted]. If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court. [cites omitted]. . . . The opinion delivered by this court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate; and either upon an application for writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly. [cites omitted].

Id. at 255-56. *See also Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), and *Magwire v. Tyler*, 84 U.S. (17 Wall.) 253 (1873), which hold that upon considering a case after a prior mandate, this Court has the power to either remand the case or, alternatively, proceed to final judgment and award judgment to the prevailing party.[13]

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[13] *See also* the following cases of this Court which established or confirm the rule that this Court has the authority to interpret its prior mandate to determine whether a lower court

The *Pelletier II* Court, in reviewing the decision of the district court's action upon the mandate of *Pelletier I*, performed exactly the same function at the Circuit Court level that this Court described in *In Re Sanford Fork & Tool* – that is, upon a new appeal from the decision based upon its mandate, it construed its own mandate and acted accordingly. Furthermore, in accordance with its authority as provided by 28 U.S.C. § 2106, as confirmed by the cases construing same, the *Pelletier II* Court properly exercised its power and authority to direct the entry of judgment by the district court in accordance with its mandate.

Petitioner contends that the panel of the Court of Appeals which decided *Pelletier I* should be precluded from reviewing the decision of the district court acting upon the mandate issued by it, and should not be allowed to construe the meaning of its earlier mandate. In making this contention, Petitioner asserts that the panel in *Pelletier I* acted as a "fact-finder," and that its statements in connection with its determinations that Petitioner committed egregious violations of Rule 11 and App. Rule 38 created the appearance that they were no longer "neutral, impartial administrator[s] of justice."

As discussed in great detail above, the *Pelletier I* Court conducted a *plenary* and *de novo* review of the *entire* record amassed in the district court using a standard of review which was deferential to the positions of Petitioner in resisting Respondent's motions for summary

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properly interpreted and acted thereon; and to take appropriate action by way of reversal or the issuance of a writ of mandamus if it is determined that the lower court acted improperly: *Sibbald v. United States*, 37 U.S. (12 Pet.) 488, 493-95 (1838); *West v. Brashear*, 39 U.S. (14 Pet.) 51, 54-55 (1840); *In Re Dubuque & P.R. Co.*, 68 U.S. (1 Wall.) 69 (1863); *Wayne County Suprs. v. Kennicott*, 94 U.S. 498 (1876); and *Gaines v. Caldwell*, 140 U.S. 228, 238-40 (1892); *In re Potts*, 166 U.S. 263, 265-66 (1896); *United States v. U.S. Dist. Court*, 334 U.S. 258, 263-64 (1948); *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 424, 427-28 (1978).

judgment and to dismiss, and deferential to the Petitioner and the district court in reviewing the district court's denial of Respondent's motion for sanctions.

It is clear from the size of the record (two large boxes of exhibits and nine volumes of the record on appeal), the length of time which the *Pelletier I* Court considered the matter (over 13 months from oral argument to the date of decision), and the breadth and scope of its opinion (over 58 pages in the published version), that the *Pelletier I* Court gave careful and complete consideration to this matter. Furthermore, as the *Pelletier I* Court stressed that in reviewing the extensive record and the *undisputed facts* set forth therein, it construed the evidence most favorably to Petitioner.[14] In so doing, it was led to the inescapable conclusion that Petitioner's claims were baseless, were known to be so by Petitioner when brought, and were brought by Petitioner in bad faith and for the improper purpose of harassing Respondent into an *in terrorem* settlement. The opinions formed by the *Pelletier I* Court were based upon its extensive knowledge of the facts in which it was required to become immersed in large measure to determine whether, as asserted by *Petitioner*, the district court had erroneously granted summary judgment to Respondent.

Even if a court's analysis of a matter properly before has caused it to express vigorous views about the law or the conduct of the parties, such circumstance does not disqualify a court from later participation in that matter. As stated by this Court in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), where this Court, called upon to determine whether a district judge who expressed strong views as to a case before him should be disqualified due to bias and prejudice, stated, in pertinent part:

> The alleged bias and prejudice must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.

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[14] *See*, footnote 7, above.

> [cite omitted]. Any adverse attitudes that [the Judge] evinced toward the defendants were based on his study of the depositions and briefs which the parties had requested him to make. What he said reflected no more than his view that, if the facts were as the Government alleged, stringent relief was called for.

Id. at 583. *See also Hepperle v. Johnson*, 590 F.2d 609, 614 (5th Cir. 1979) ("Appellant's grievance against members of this court concerns only judicial conduct: he complains of prior rulings by the court. Such allegations are insufficient grounds for disqualification [cites omitted]."); *United States v. Barry*, 961 F.2d 260 (D.C. Cir. 1992) (remarks reflecting even strong views about a defendant will not call for a judge's recusal so long as those views are based upon his own observations during the performance of his judicial duties); *Garver v. United States*, 846 F.2d 1029 (6th Cir. 1988) (it would be a great disservice to imply that a vigorous expression of views on a subject appropriately before a judicial tribunal can become evidence of judicial bias).

It would be a greater disservice if an appellate panel which issued a mandate to district court were to be precluded from reviewing the decision of the district court interpreting that mandate. Indeed, if such were the rule in this Court, there could be no review on appeal from an interpretation of a previously issued mandate. Such a rule at the circuit court level would perhaps be technically possible as to panel opinions, but what would happen in the event of a decision rendered *en banc*? Furthermore, what legitimate purpose would be served by having such a rule?

Respondent respectfully submits that Petitioner's plea for a panel different from that which decided *Pelletier I* is simply a request to "forum shop" in a vain hope of obtaining a different result from that which the undisputed facts and the law clearly demanded. This argument, as his others, should be summarily rejected by this Court.

C. Due to the Fact Specific Nature of this Matter, This Court Should Not Consider This Case on Certiorari.

As with his Petition to this Court from *Pelletier I*, Petitioner's arguments are based upon his assertions that the Court of Appeals erroneously viewed the *undisputed material facts* while conducting its own *plenary* and *de novo* review of the massive record amassed in the district court. Indeed, it was based upon this review that the *Pelletier I* Court reached its conclusions that the district court erred in not imposing sanctions against Petitioner because it had failed to conduct a searching inquiry into the merits of Petitioner's complaint, and, as a result, developed a clearly erroneous view of the evidence. 921 F.2d at 1514; *Cooter & Gell*, 496 U.S. at 402.

According to Petitioner, *Pelletier II*'s interpretation of the mandate of *Pelletier I* was impermissibly tainted by an "erroneous" view of the evidence. If this Court were to review the *Pelletier I* or *Pelletier II* decisions, it would be required to conduct its own thorough and sifting review of those facts, because the determination of the Court of Appeals as to the severity of the conduct warranting sanctions, and the proper sanction to be imposed for such conduct, are integrally entwined in the facts.

Historically, this Court has refrained from granting certiorari to review evidence and discuss specific facts, or the inferences from the evidence. *See*, for example, *United States v. Johnston*, 268 U.S. 220, 227 (1925); *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938). Respondent respectfully submits it should also decline to do so in this case.

CONCLUSION

As a result of Petitioner's continuing efforts to avoid the consequences of his own conduct which *Pelletier I* concluded was an "improper use of the civil RICO provisions" in an attempt to "shake down" an opponent and

"extort a settlement" at the "expense of the federal judiciary and those who need ready access to the courts," 921 F.2d at 1522, Respondent has continued to be embroiled in this litigation, because the district court, apparently inveigled by Petitioner's sophistry, failed to adhere to the clear mandate of *Pelletier I*. Referring back to the analysis of *Pelletier I*, and the factual predicate and legal basis upon which Petitioner's responsibility for sanctions and the nature of those sanctions were determined, *Pelletier II* corrected the district court's error making use of the undisputed and uncontested evidence of the reasonable attorney's fees, expenses of litigation, and court costs presented to the district court. The action of the Court of Appeals in reviewing the meaning of its mandate and the failure of the district court to act properly thereon was appropriate and correct. Considering the fact specific nature of this case, it is not an appropriate candidate for *certiorari*. This Court should deny Petitioners' writ.

Respectfully submitted,

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Appendix

STATUTES AND RULE PROVISIONS INVOLVED App. 1

28 U.S.C. § 2106 (1948) ..... App. 1

Fed. R. App. P. 38 ..... App. 1

Fed. R. Civ. P. 12(b)(6) ..... App. 1

Fed. R. Civ. P. 43(e) ..... App. 1

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Rule 220-1, Local Rules of Practice for the United States District Court for the Northern District of Georgia – Filing of Motions and Responses; Hearings ..... App. 2

Rule 270-1, Local Rules of Practice for the United States District Court for the Northern District of Georgia – Attorney's Fees – Procedure for Determination ..... App. 3

Plaintiff's Counsel's Motion for an Evidentiary Hearing and for a Re-Determination of the Appropriate Sanction to be Imposed Pursuant to Rule 11, and Memorandum in Support Thereof ..... App. 6

STATUTES AND RULE PROVISIONS INVOLVED

28 U.S.C. § 2106 (1948):

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Fed. R. App. P. 38:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages, and single or double costs to the appellee.

Fed. R. Civ. P. 12(b)(6):

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . A motion making any one of these defenses shall be made before pleading if a further pleading is permitted. . . .

Fed. R. Civ. P. 43(e):

> **(e) Evidence on Motions.** When a motion is based on facts not appearing of record the court may hear the matters on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

Fed. R. Civ. P. 78:

> Unless local conditions make it impracticable, each district court shall establish regular times and places, at such intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge may at any time or place and on such notice, if any, as the judge considers reasonable may make orders for the advancement conduct, and hearing of actions.
>
> To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

Rule 220-1, Local Rules of Practice for the United States District Court for the Northern District of Georgia – Filing of Motions and Responses; Hearings:

> **(a) Filing of Motions.**
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> (1) Every motion presented to the clerk for filing shall be accompanied by a memorandum of law citing supporting authorities and, when allegations of fact are relied upon, by supporting affidavits. Motions not in conformance with this rule shall not be accepted for filing.
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> (2) Specific filing times for some motions are set forth below. All other motions must be filed WITHIN 100 DAYS after the complaint is filed, unless the filing party has obtained prior permission of the Court to file later.

(b) Response to Motion.

(1) Each party opposing a motion shall serve his response, responsive memorandum, affidavits, and any other responsive material not later than ten days after service of the motion, except that in Cases of motion for summary judgment the time shall be twenty days after the service of the motion. Failure to file a response shall indicate that there is no opposition to the motion.

(2) Although a reply by the movant shall be permitted, it shall not be necessary for the movant to file a reply as a routine practice. When the movant deems it necessary to file a reply brief, that brief shall be served not later than ten days after service of the responsive pleading. No further briefs may be filed by the parties, except upon order of the Court.

(c) Hearings. All motions shall be decided by the Court without oral hearing unless a hearing is ordered by the Court.

Rule 270-1, Local Rules of Practice for the United States District Court for the Northern District of Georgia – Attorney's Fees – Procedure for Determination:

If a final judgment, including a judgment made final under F. R. Civ. P. 54(b), does not determine (or establish the procedures for determining) the amount of attorney's fees which are authorized by federal statute to be awarded by the Court to or on behalf of a prevailing party or which may be sought under the equitable or inherent powers of the Court, the following procedures shall apply:

(1) The award of such fees (and expenses incident thereto not ordinarily allowable as taxable costs) shall be requested by special written motion addressed to the Court and shall not be included in a cost bill, in a motion for taxation or retaxation of costs, or in a motion under F. R.Civ.P. 50(b), 52(b), or 59.

(2) The motion shall be filed with the Clerk of Court and, in accordance with Rule 5, Federal Rules of Civil Procedure, shall be served upon the parties against whom the award is sought at least 10 days prior to the expiration of the time within which such opposing parties can file a timely notice of appeal from the judgment under Rule 4(a)(1, 3-6), Federal Rules of Appellate Procedure.

(3) The motion shall specify the judgment and the statute or other grounds on this basis of which entitlement to the award is claimed and shall state the amount (or provide a fair estimate of the approximate amount) of the fees and expenses sought. Within 30 days (or such other period as the Court may prescribe) after filing the motion, the movant shall file and serve a detailed specification and itemization of the requested award, with appropriate affidavits and other supporting documentation.

(4) Hearings on the motion shall be conducted by the Court in accordance with F. R. Civ. P. 43(e) and F. R. Civ. P. 78 and in accordance with applicable statutory and decisional standards and principles.

(5) Pendency of a motion filed under this rule does not extend the time for appealing from, or for filing a motion under F. R. Civ. P. 50(b), 52(b), or 59 directed to the judgment giving rise

to the claim for attorney's fees. The Court may, however, take the motion into consideration in ruling upon a motion for extension of time for appealing filed under F. R. A. P. 4(a)(5).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RONALD O. PELLETIER,
Plaintiff

v.

GARY D. ZWEIFEL,
Defendant

Civil Action
Number
1:86-CV-156-ODE

PLAINTIFF'S COUNSEL'S MOTION FOR AN EVIDENTIARY HEARING AND FOR A RE-DETERMINATION OF THE APPROPRIATE SANCTION TO BE IMPOSED PURSUANT TO RULE 11

Herbert P. Schlanger, counsel for plaintiff, hereby moves this Court for an order setting a hearing at which he may present testimony and evidence concerning the changes in circumstances, occurring since January, 1991, relating to the deterrent effect that issuance of the Court of Appeals' opinion in this matter has had on him and of his financial circumstances and ability to pay any monetary sanction. Counsel further moves this Court for an order, following the hearing, re-examining and re-determining the appropriate sanction to be imposed pursuant to Rule 11, Fed.R.Civ.P.

A memorandum in support of this motion is appended hereto.

Respectfully submitted this 4th day of February, 1992.

/s/ Herbert P. Schlanger
Herbert P. Schlanger
Attorney for plaintiff

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
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RONALD O. PELLETIER,
Plaintiff

v.

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Defendant

Civil Action Number
1:86-CV-156-ODE

PLAINTIFF'S COUNSEL'S MEMORANDUM IN SUPPORT OF HIS MOTION FOR AN EVIDENTIARY HEARING AND REGARDING THE APPROPRIATE SANCTION TO BE IMPOSED PURSUANT TO THE PROVISIONS OF RULE 11[1]

[1] Plaintiff has not abandoned his earlier arguments concerning the appropriate amount of sanctions to be imposed. This motion and memorandum is made in order to suggest to the Court an alternative basis for any order it may enter.

1. Earlier determination not binding

Because of intervening changes in circumstances,[2] the Court of Appeals' determination of the nature of the appropriate sanction to be imposed on plaintiff and his counsel (and of its measure) is no longer binding on this Court.[3] It is a longstanding principal of law that changes in the underlying facts and circumstances which are material to litigation, occurring during the litigation, may render non-binding earlier determinations based on those facts. *See, e.g., Pyramid Life Ins. Co. v. Curry*, 291 F.2d 411, 414 (8th Cir., 1961) ("The law of the case rule does not apply if the evidence on the later trial is substantially different from that on the former trial.")[4]

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[2] As this Court is aware, plaintiff's counsel has filed a bankruptcy petition. This was caused, at least in significant measure, by the existence of the Court of Appeals' opinion in this case.

[3] The Court of Appeals' determination that *some* sanction should be imposed is, of course, still binding. It is only the nature and scope of that sanction which may now be redetermined by this Court.

[4] Since the Court of Appeals in this case was without benefit of any evidence of the deterrent effect of *any* sanction, and since it was without benefit of any evidence of the effect that imposition of monetary sanctions would have (and the mere possibility of which *has* had) on counsel, factual determinations made by this court based on the evidence of changed circumstances would permit this Court to make a *de novo* determination of the nature and scope of the appropriate sanction to be imposed and whether it is still appropriate for the sanction to be imposed jointly and severally on counsel and the plaintiff.

The Supreme Court has recognized that changed circumstances may be considered even on appeal, after entry of final judgment:

> We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And *in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered.* . . . We have said that to do so is . . . only to deal appropriately with a matter arising since [the] judgment and having a bearing upon the right disposition of the case. [Citations omitted].
>
> *Patterson v. Alabama*, 294 U.S. 600, 607, 55 S.Ct. 575, 578 (1935) (emphasis supplied).

If, as the Supreme Court has stated, it is proper for an *appellate* court to take note of changed circumstances in order to "do justice" *following* entry of a final judgment, it is clearly within the purview of a *trial* court to take note of them *prior* to the entry of such judgment and to act accordingly. In fact, the Supreme Court appears to have recognized this:

> Like the original district court judgment, the appellate mandate relates to the record and issues then before the court, and does not purport to deal with possible later events. Hence, the district judge is not flouting the mandate by acting on the motion [to set aside the judgment following an affirmance of that judgment]. [Citations omitted.]

Standard Oil Co. v. U.S., 429 U.S. 17, 18-19, 97 S.Ct. 31, 32 (1976)[5]

That principal should be applied in this case. It is respectfully requested that the Court, therefore, conduct a hearing and make a determination of what sanction is appropriate at *this* time and under the *current* circumstances.

2. Appropriate sanction

At this point, there is a question as to whether any monetary sanction is necessary to serve Rule 11's dual purposes of individual and general deterrence. As to individual deterrence, Mr. Schlanger has had his integrity, motivation, and professionalism questioned and has been publicly lambasted in the harshest possible terms by the Chief Judge of the Court of Appeals, has been the subject of considerable adverse publicity within the profession, has seen the Court of Appeals' opinion have a deleterious effect on his practice, has had to file bankruptcy (because, at least in part, the pendency of this proceeding precluded him from being able to refinance his debts), and has – beyond question – been deterred from filing litigation which might be considered controversial without exhaustive pre-filing research and documentation.

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[5] *See, also, e.g., Nguyen v. U.S.*, 792 F.2d 1500 (9th Cir., 1986) (permitting the district court to allow plaintiff to amend following an earlier remand made with directions to enter summary judgment for the defendant).

Given the publicity accorded to the Court of Appeals' opinion in this matter, the goal of general deterrence has certainly been served. The members of the Bar are now on notice that if they bring a suit of which the Court of Appeals disapproves, they can be subjected to massive monetary sanctions. This knowledge cannot but give attorneys pause and deter the filing of less-than-certain lawsuits without adequate pre-filing preparation.

Thus, both prongs of Rule 11's purpose have been served. The "piling on" of monetary sanctions at this point would be unnecessary to insure deterrence.

However, if this Court believes that the Court of Appeals' mandate nonetheless requires imposition of monetary sanctions, it is now free – given the additional evidence it will have concerning the deterrent effects to date – to re-examine the proper scope of the sanction. As all courts which have considered the issue have agreed, the amount of a monetary sanction should be only an amount sufficient to deter conduct violative of Rule 11.[6]

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[6] *See, e.g., Doering v. Union County Board of Chosen Freeholders*, 857 F.2d 191, 194 (3rd Cir., 1988) ("A district court's choice of deterrent is 'appropriate when it is the *minimum* that will serve to *adequately* deter the undesirable behavior.' ") and the cases and authorities cited therein; *White v. General Motors*, 908 F.2d 675, 684-85 (10th Cir., 1990) ("[T]he primary purpose of sanctions is to deter attorney and litigant misconduct, not to compensate the opposing party for its costs in defending a frivolous suit. *It is particularly inappropriate to use sanctions as a a means of driving certain attorneys out of practice.*" [emphasis supplied]); *In re Kunstler*, 914 F.2d 505, 522 (4th Cir., 1990) ("[T]he least severe sanction adequate to serve the purposes of Rule 11 should be imposed. . . . It is clear that Rule 11 should not blindly be used to shift fees." [citation omitted]); *Stewart v. American*

A determination of whether a sanction will be an effective deterrent (or whether sufficient deterrence has already been achieved) cannot be made without a factual determination of the circumstances which exist at the time of its imposition – both as to the specific circumstances of those involved (individual deterrence) and the impact any specific sanction will have on other members of the Bar (general deterrence).

This requires, at the least, a factual evaluation and determination (if monetary sanctions are deemed appropriate) of an ability to pay (since Rule 11 was not intended to impoverish attorneys and litigants, or to drive them into bankruptcy, but only to deter specific conduct)[7] and of the sanction's effect on the attorney's continued ability to practice.[8] Thus, this Court should grant this motion, conduct an evidentiary hearing, and determine the appropriate nature and scope of the sanction to be imposed.

Int'l Oil & Gas Co., 845 F.2d 196, 201-202 (9th Cir., 1988) ("The district court considered that although the full amounts appeared to be reasonable, a lesser amount was sufficient to get the attention of Meridian and deter it from further abuses. The imposition of sanctions was well within the sound discretion of the district court.")

[7] Mr. Schlanger will testify that if anything more than a very nominal monetary sanction were imposed it would be impossible for him to effectuate a feasible plan in his Chapter 11 proceeding and it would destroy him financially.

[8] *See, e.g., Doering*, 857 F.2d at 194-197; *In re Yagman*, 796 F.2d 1165, 1185 (9th Cir., 1986).

CONCLUSION

For all of the foregoing reasons, plaintiff's counsel's motion should be granted.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have, this 4th day of February, 1992, served all counsel of record with the foregoing

MOTION

by depositing a copy in the U.S. Mail in a envelope with sufficient postage affixed to insure delivery and addressed to:

Robert E. Hicks, Esq.
Robert A. Bartlett, Esq.
Hicks, Maloof & Campbell
Suite 2200
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/s/ Herbert P. Schlanger
Herbert P. Schlanger
Attorney for plaintiff